90-191

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DAVID M. BUCKLEY and JOHN E. REID AND ASSOCIATES, INC., an Illinois corporation,

Petitioners,

vs.

TAMMIE R. ELLIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

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QUESTIONS PRESENTED

The following questions are presented by this Petition for Certiorari:

1. Whether Colorado law violates due process by allowing the jury to award punitive damages without adequate standards?

2. Whether Colorado law violates due process by allowing the jury to double up the punishment by awarding punitive damages in cases involving outrageous conduct?

3. Whether jury verdicts totaling $247,000.00 in this case violated due process by being grossly excessive and disproportionate?

4. Whether the violation of due process in this case was cured by the remittitur granted by the trial court on the award

for professional negligence and the judicial review of the awards for outrageous conduct and punitive damages?

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner John E. Reid and Associates, Inc., states that it is an Illinois corporation. It does not have a parent company or nonwholly owned subsidiary.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1

RULE 29.1 STATEMENT..... iii

TABLE OF AUTHORITIES..... ix

OPINIONS BELOW..... 1

JURISDICTION..... 1

CONSITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE

A. THE PARTIES..... 4

B. THE ACTION BELOW..... 4

1. Proceedings in the Trial Court..... 5

(A) Ellis' Claims..... 5
(B) The Verdicts..... 5
(C) The Post-Trial Motions..... 6

2. The Appeal to the Colorado Court of Appeals..... 7

3. Petition for Certiorari to the Supreme Court of Colorado..... 8

C. STATEMENT OF FACTS..... 8

1. The Internal Theft Investigation at Fashion Bar..... 8

2. Evidence Pointing to Ellis' Guilt..... 9

3. Ellis' Polygraph Examination..... 11

4. Ellis' Post-Test Interview..... 12

5. Ellis' Emotional Distress..... 14

6. Ellis' Suspension and Termination by Fashion Bar..... 15

7. Ellis' Failure to Seek Medical Care for Her Claimed Emotional Distress..... 15

8. The Expert Testimony..... 16

9. The Trial Court's Rulings on Emotional Distress..... 17

10. Jury Instruction on Punitive Damages..... 18

REASONS FOR GRANTING THIS PETITION..... 18

1. COLORADO LAW VIOLATES DUE PROCESS BY ALLOWING THE JURY TO AWARD PUNITIVE DAMAGES WITHOUT ADEQUATE STANDARDS..... 24

2. COLORADO LAW VIOLATES DUE PROCESS BY ALLOWING THE JURY TO DOUBLE UP THE PUNISHMENT BY AWARDING PUNITIVE DAMAGES IN CASES OF OUTRAGEOUS CONDUCT..... 31

3. JURY VERDICTS TOTALING $247,000 IN THIS CASE VIOLATED DUE PROCESS BY BEING GROSSLY EXCESSIVE AND DISPROPORTIONATE..... 37

4. THE VIOLATION OF DUE PROCESS IN THIS CASE WAS NOT CURED BY THE REMITTITUR GRANTED BY THE TRIAL COURT ON THE AWARD FOR PROFESSIONAL NEGLIGENCE AND THE JUDICIAL REVIEW OF THE AWARDS FOR OUTRAGEOUS CONDUCT AND PUNITIVE DAMAGES..... 40

CONCLUSION..... 45

LIST OF APPENDICES

Page

APPENDIX A
RULINGS REGARDING DEFENDANTS' MOTIONS FOR POST-TRIAL RELIEF - ISSUED BY THE TRIAL COURT ON JULY 23, 1987..... A 1

APPENDIX B.
OPINION, COLORADO COURT OF APPEALS, DATED NOVEMBER 16, 1989..... B 1

APPENDIX C
ORDER DENYING REHEARING BY THE COLORADO COURT OF APPEALS DATED JANUARY 11, 1990..... C 1

APPENDIX D
ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT, DATED APRIL 30, 1990..... D 1

APPENDIX E
ORDER ISSUED BY THE COLORADO SUPREME COURT GRANTING RESPONDENT'S MOTION TO STRIKE THE PETITION FOR RECONSIDERATION ON DENIAL OF PETITION FOR CERTIORARI, DATED MAY 11, 1990..... E 1

Page

APPENDIX F
MANDATE ISSUED BY THE COLORADO COURT OF APPEALS AFFIRMING THE JUDGMENT OF THE TRIAL COURT, DATED MAY 10, 1990..... F 1

APPENDIX G
ORDER ISSUED BY THE COLORADO COURT OF APPEALS RECALLING THE MANDATE, DATED MAY 18, 1990..... G 1

TABLE OF AUTHORITIES

Page

Cases

A. B. Small v. American Sugar Refining Co.
267 U.S. 233 (1925)..... 35

Bankers Life and Casualty v. Crenshaw
486 U.S. 71, 108 S.Ct. 1645
100 L.E.2d 62 (1988)..... 24

Bouie v. Columbia
378 U.S. 347 (1964)..... 45

Browning Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.
492 U.S. ____, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989)..-23,24,37 21,22,

Coates v. Cincinnati
402 U.S. 611 (1971)..... 24,26

Gertz v. Robert Welch, Inc.
418 U.S. 323 (1974)..... 36

Giaccio v. Pennsylvannia
382 U.S. 399 (1966)..... 36

Grayned v. City of Rockford
408 U.S. 104 (1972)..... 45

Page

Cregg v. Georgia
428 U.S. 153 (1976)..... 39

Huckle v. Money
2 Wils. 205 (K.B. 1763)..... 19

Knierim v. Izzo
22 Ill.2d 73, 174 N.E.2d
157 (1961)..... 34,35

Jacobs v. Board of School
Commissioners
490 F.2d 601 (7th Cir. 1973)..... 36

Jordan v. DeGeorge
341 U.S. 223 (1951)..... 35

Kolender v. Lawson
461 U.S. 352 (1983)..... 24,26

Marks v. United States
430 U.S. 188 (1977)..... 45

Mathews v. Eldridge
424 U.S. 319 (1976)..... 24

Pacific Mutual Life Insurance
Company v. Cleopatra Haslip
553 So.2d 537 (1989), cert.
granted April 2, 1990,
(No. 89-1279)..... 21,45,46

Pyler v. Doe
457 U.S. 202 (1982)..... 39

Page

Roberts v. United States Jaycees
468 U.S. 609 (1984)..... 45

Rosenbloom v. Metromedia, Inc.
403 U.S. 29 (1971)..... 36

Smith v. Goguen
415 U.S. 566 (1974)..... 26

Smith v. Wade
461 U.S. 30 (1983)..... 23,36

Solem v. Helm
463 U.S. 277 (1983)..... 39

Trop v. Dulles
356 U.S. 86 (1958)..... 38,39

United States Constitution

Fifth Amendment..... 2,3

Fourteenth Amendment..... 3

Statutes

Colo. Rev. Stat. Sec. 13-21-102
(1973)..... 3,24,25

Page

Colo. Rev. Stat. Sec. 13-21-102 (amended)..... 26,27,28,29

Colo. Rev. Stat. Sec. 13-25-127(2) (1973)..... 29

Publications

Givelber, "The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct", 82 Colum. L. Rev. 42 (1982) 31,32

Owens, "Punitive Damages in Product Liability Litigation" 74 Mich. L. Rev. 1258 (1976)..... 19

Reid and Inbau, Truth and Deception: The Polygraph ('Lie Detector') Technique (The Williams & Wilkins Co., 1966 and 1977)..... 30

Inbau and Reid, Criminal Interrogations and Confessions (The Williams & Wilkins Co., 1962 and 1967)..... 30

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

DAVID M. BUCKLEY
and
JOHN E. REID AND ASSOCIATES, INC.,
an Illinois corporation,
Petitioners,
vs.
TAMMIE R. ELLIS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COLORADO COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

David M. Buckley and John E. Reid and Associates, Inc., an Illinois corporation ("Buckley" and "Reid") respectfully petition for a writ of certiorari to review the judgment of the Colorado Court of Appeals in this case.

OPINIONS BELOW

The opinion of the District Court of Adams County, Colorado, is unreported (App., infra, A 1 to A 10). The opinion of the Colorado Court of Appeals (App., infra, B 1 to B 17) is reported as Tammie R. Ellis v. David M. Buckley, et al., No. 87 CA 1322 (November 16, 1989) 790 P.2d 875 (Colo. App. 1989).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1251(a).

The judgment of the Colorado Court of Appeals was entered on November 16, 1989. A timely petition for rehearing

was denied by the Colorado Court of Appeals on January 11, 1990 (App., infra, C 1). A timely petition for certiorari was denied by the Supreme Court of Colorado on April 30, 1990 (App., infra, D 1 and D 2). A petition for reconsideration was striken by the Supreme Court of Colorado on May 11, 1990 (App., infra, E 1 and E 2). The mandate was issued by the Colorado Court of Appeals on May 10, 1990 (App. infra, F 1) and was recalled by the Colorado Court of Appeals on May 18, 1990 (App., infra, G 1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides, in relevant part:

> "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived

> of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Fourteenth Amendment, Section 1, of the United States Constitution provides, in relevant part:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. During the time period applicable to this case, the Colorado Revised Statutes provided for punitive damages in Section 13-21-102 C.R.S. (1973), as follows:

> **Exemplary Damages.** In all civil actions in which damages are assessed by a jury for a wrong done to the person, or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and

> feelings, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages.

STATEMENT OF THE CASE

A. THE PARTIES

Petitioner David M. Buckley ("Buckley") is a polygraph examiner employed by John E. Reid and Associates, Inc., and petitioner John E. Reid and Associates, Inc. ("Reid") is an Illinois corporation engaged in performing employee theft investigations on behalf of employers.

Respondent Tammie Ellis ("Ellis") was a cashier at Fashion Bar's Northglenn store and was administered a polygraph examination and interviewed by Buckley during an internal theft investigation in February, 1984.

B. THE ACTION BELOW

Ellis was terminated by Fashion Bar after she failed a polygraph examination

during the internal theft examination. In May, 1984, she sued Fashion Bar, Buckley, who administered the polygraph examination, and Reid. Prior to trial, she settled with Fashion Bar.

1. Proceedings in the Trial Court

(A) Ellis' Claims

Ellis alleged that Buckley was negligent in finding that she was deceptive on the polygraph examination and that Buckley had intentionally inflicted emotional distress upon her through his outrageous conduct. She claimed compensatory damages of $8,400 for lost wages and $3,000 for lost medical benefits related to the delivery of her first child. (Tr., Vol. III 141 and 144).

(B) The Verdicts

The jury returned three verdicts for Ellis: $74,000 on her claim

for professional negligence, $48,000 on her claim for intentional infliction of emotional distress by outrageous conduct, and $125,000 on her claim for punitive damages.

(C) **The Post-Trial Motions**

Buckley and Reid filed motions for post-trial relief requesting a judgment notwithstanding the verdict or a remittitur on all three claims. The trial court granted the motion for a new trial on the professional negligence claim subject to Ellis' accepting a remittitur in the amount of $62,600. The remaining post-trial motions were denied (App., infra, A 1 to A 10). Ellis accepted the remittitur and the verdict on her claim for professional negligence was reduced from $74,000 to $11,400, which consisted of $8,400 in lost wages and $3,000 in lost medical benefits related to the delivery of Ellis' first child.

2. The Appeal to the Colorado Court of Appeals

Buckley and Reid filed a timely appeal. In a split decision filed on November 16, 1989, the Colorado Court of Appeals affirmed the three verdicts for Ellis -- $125,000 on her claim for punitive damages, $48,000 on her claim for outrageous conduct, and $11,400 on her claim for professional negligence (App., infra, B 1 to B 10).

Justice Hodges dissented, finding, among other things, that the punitive damage award of $125,000 was not sustainable (App., infra, B 11 to B 17).

Buckley and Reid filed a timely petition for rehearing, which was denied by an order entered on January 11, 1990. Justice Hodges would have granted the petition for rehearing (App., infra, C 1).

3. Petition for Certiorari to the Supreme Court of Colorado

Buckley and Reid filed a timely petition for certiorari. The Supreme Court of Colorado denied the petition in an order entered on April 30, 1990. Justice Rovira would have granted certiorari on whether the Court of Appeals erred in upholding the jury's punitive damage award (App., infra, D 1 and D 2). Buckley and Reid filed a petition for reconsideration which was stricken by the Supreme Court of Colorado in an order entered on May 11, 1990 (App., infra, E 1 and E 2).

C. STATEMENT OF FACTS

1. The Internal Theft Investigation at Fashion Bar

Ellis was a cashier at Fashion Bar's Northglenn store from May, 1983 to February, 1984 (Tr. Vol. III, pp. 96-97). The store had miscellaneous

cash shortages of $1,800 (Tr. Vol. V, p. 459). Reid was hired by Fashion Bar to conduct an internal theft investigation in early February, 1984. Sixteen Fashion Bar employees were administered polygraph tests and interviewed. Buckley administered polygraph examinations and interviewed ten of the employees, including Ellis (Vol. X, Ex. F).

2. **Evidence Pointing to Ellis' Guilt**

Prior to administering a polygraph examination and interviewing Ellis, Buckley had been told by another Fashion Bar employee that she had seen Ellis take some money from the cash register at Fashion Bar and place it in an envelope containing her personal cancelled checks. The other employee also stated that she saw Ellis place the envelope under her desk, and that she thought Ellis was

probably stealing the money, because it was not normal procedure for cashiers to remove money from the register in this fashion (Vol. X, Ex. F).

The other Fashion Bar employee could not be located at the time of trial and did not testify. When this matter came up in the trial court, Ellis' counsel objected to that portion of Buckley's report containing the accusation as hearsay. In response, the trial court "whited out" Ellis' name as the person accused of theft on the copy of Buckley's report that went to the jury. However, so that it would be available on appeal, the trial court placed a complete copy of the report, without deletions, in a sealed envelope and made it part of the record (Tr. Vol. 4A, p. 592).

3. Ellis' Polygraph Examination

Prior to the polygraph examination, Ellis signed a written consent to disclosure of the test results and any relevant statements made by her to Fashion Bar (Vol. X, Ex. A).

During the examination, Buckley asked Ellis the following questions (Vol. X, Ex. 1):

(1) Did you steal any merchandise from Fashion Bar?

(2) Did you steal any money from Fashion Bar?

(3) Do you know of any present employee stealing from Fashion Bar?

(4) Did you falsify any company records to steal from Fashion Bar?

(5) Did you give any unauthorized discounts at Fashion Bar?

Buckley found that there were significant emotional responses indicative of deception when Ellis was asked questions about

stealing merchandise and money and having knowledge of other employees doing so. Ellis' emotional responses on the remaining questions were such that Buckley was unable to render an opinion of truth or deception (Vol. X, Ex. F). After scoring the charts, Buckley told Ellis that he found indications of deception (Tr. Vol. III, p. 108).

4. Ellis' Post-Test Interview

Buckley then commenced the post-test interview by telling Ellis about different cases that he had in the past of people who had stolen money (Tr. Vol. III, p. 108). Ellis said Buckley wanted to know how much she had taken. Buckley asked her if she had taken $100, if she had taken $50, and if she had taken $10. She told him that she had not taken anything. She does not know how many times he asked her if she had taken anything

from Fashion Bar -- maybe twelve times (Tr. Vol. III, pp. 109-110).

According to Ellis' testimony, Buckley did not appear to believe her and did not give her a chance to talk. He was excited and talked fast. He was short and sharp and she felt as if he wanted a confession from her (Tr. Vol. III, p. 126). Buckley said that there might be something minor that she was not accounting for. She told him that she was not stealing things, but was exchanging wheat pennies. She testified that he drilled her on that and then asked her if there was something else she had taken. She told him that she had not paid for a bag of potato chips (Tr. Vol. III, p. 111), explaining she did not have enough money and owed ten cents, but did pay it later (Tr. Vol. III, p. 112).

The post-test interview lasted two hours. Buckley did not tell her that she had to stay (Tr. Vol. IV, p. 127), nor did she ever ask to leave. She did not at any time ask Buckley, "Can I go?", "Are you finished?", "Is this done?", or words to that effect. She did not ask because he continued to talk to her and for no other reason (Tr. Vol. IV, p. 163).

5. Ellis' Emotional Distress

When she told Buckley about the wheat pennies and potato chips, Ellis started crying and he handed her a tissue. She asked him to leave the room and he did. When he came back in, he started questioning her again (Tr. Vol. III, pp. 112-113). Ellis did not say how long Buckley questioned her after she started crying. Buckley stated that

he talked to her for three or four, maybe five more minutes (Tr. Vol. IV, p. 595).

Ellis' husband was waiting for her and she left with him (Tr. Vol. III, p. 114). Her husband took her back to Fashion Bar, where she was supposed to work that night. According to her, she was too upset to work and her manager let her off. Her husband took her home (Tr. Vol. III, p. 114).

6. Ellis' Suspension and Termination by Fashion Bar

The day after her polygraph examination and interview, Ellis returned to the store and was told she was suspended for having failed the polygraph test. Three days later, Fashion Bar terminated her. (Tr. Vol. IV, pp. 129-137).

7. Ellis' Failure to Seek Medical Care for Her Claimed Emotional Distress

Ellis did not consult a psychiatrist or psychologist. She has not had

counseling, other than from her pastor. She has not taken any prescription medication -- just an aspirin or two for headaches (Tr. Vol. IV, pp. 154-155).

8. The Expert Testimony

Ellis produced two expert witnesses who testified that Buckley should have scored her polygraph charts as inconclusive rather than deceptive. However, neither of Ellis' expert witnesses found that Ellis' charts should have been scored as truthful. Nor did they find any fault with the way Buckley conducted himself during the polygraph examination or post-test interview. They did not testify that he treated Ellis improperly or that he should not have questioned her as he did or for as long as he did (Tr. Vol IV, pp. 204-304 (Backster); and Tr. Vol. IV, pp. 309-329 (Smith)).

9. The Trial Court's Rulings on Emotional Distress

The trial court made two rulings concerning recovery for emotional distress. Prior to trial, Buckley and Reid's motion for summary judgment on Ellis' claim for negligent infliction of emotional distress was granted and all claims for emotional distress resulting from any negligence in connection with the polygraph examination were dismissed (Tr. Vol. II, p. 427, Entry dated April 2, 1987). At the close of the evidence, the trial court ruled that any emotional distress caused by outrageous conduct must be confined to that which resulted from the post-test interview. The trial court ruled that, as a matter of law, the report of Ellis' failure to pass the examination could not be deemed outrageous conduct and that any emotional

distress related to that report or her failure to pass the examination was not actionable (Tr. Vol. IX, pp. 919-920).

10. Jury Instruction on Punitive Damages

The trial court gave the following instruction on punitive damages:

INSTRUCTION NO. 26

> If you find in favor of the plaintiff, Tammie R. Ellis, and award her actual damages for negligence or for her claim of outrageous conduct, then you should consider whether the plaintiff is entitled to exemplary damages. If you also find beyond a reasonable doubt that the injury complained of was attended by circumstances of insult or a wanton or reckless disregard of the rights and feelings of the plaintiff, then in addition to any actual damages, you may also award the plaintiff a reasonable sum as exemplary damages.
>
> Exemplary damages are not to be construed as compensation to the plaintiff for wrong done, but as punishment to the defendant, and as an example to others.

REASONS FOR GRANTING THIS PETITION

The remedy of punitive damages has deep roots in ancient law and medieval

English statutes. It was expressly addressed for the first time in Huckle v. Money, 2 Wils. 205 (K.B. 1763), where the plaintiff was imprisoned pursuant to "a nameless warrant." The jury was found justified in awarding damages beyond the small injury done to the plaintiff because of the desirability of taking into account "a most daring public attack made upon the liberty of the subject." Id. at 206.

The punitive damage remedy was recognized in America and, by the middle of the last century, gained substantial acceptance in this country. See Owens, Punitive Damages in Product Liability Litigation, 74 Mich. L.Rev. 1258 (1976). The purpose behind the imposition of punitive damages was, and continues to be, to punish the defendant for the commission of an aggravated or outrageous

act of misconduct and to deter him and others from such conduct in the future.

Although the remedy of punitive damages is now firmly established by statute in many states and as part of the common law in others, it has become the subject of great abuse. In the recent past, punitive damages have changed from a remedy reserved for the exceptional case of particularly fraudulent or malicious behavior to a commonplace part of virtually every tort action. The unpredictable, discretionary nature of those awards is having an in terrorem effect on not only defendants, but also plaintiffs against whom "defensive" counterclaims are filed.

Juries have been given free reign to punish selectively, to indulge bias, prejudice and any wealth distribution inclinations they may have, and to exercise standardless discretion to render

awards bearing no necessary relationship to actual harm caused.

This Court has before it a case in which it will shortly decide whether the procedures used in civil punitive damage cases violate due process. Pacific Mutual Life Insurance Company v. Cleopatra Haslip, 553 So.2d 537 (1989). Certiorari to this Court was granted on April 2, 1990 (No. 89-1279). Previously, six justices of this Court had expressed concern that the way in which juries were allowed to award punitive damages in this country may be violating due process.

In Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. ___, 109 S.Ct. 2909, 106 L.Ed. 2d 219 (1989), Justice Brennan, joined by Justice Marshall, separately concurred in an opinion which clearly stated the

views of those Justices that serious due process issues exist as to punitive damages awards under present law.

Justice Brennan wrote, at pages 241-242:

> Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are grossly excessive, Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111, 53 L.Ed. 417, 29 S.Ct. 220 (1909), or so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable, St. Louis, I.M.&S.R. Co. v. Williams, 251 U.S. 63, 66-67, 64 L.Ed.139, 40 S.Ct. 71 (1919). See also Southwestern Telegraph & Telephone Co. v. Danaher, 238 U.S. 482, 491, 59 L.Ed. 1419, 35 S.Ct. 886 (1915); Missouri Pacific Railway Co. v. Humes, 115 U.S. 512, 522-533, 29 L.Ed. 463, 6 S.Ct. 110 (1885).
>
> * * *
>
> Without statutory (or at least common law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision.

Justice O'Connor, joined by Justice Stevens, separately concurred, and joined in Justice Brennan's view that the due process issues remain open, stating, at page 243:

> Moreover, I share Justice Brennan's view, ante, at ___, ___, 106 L.Ed.2d 241-242, that nothing in the Court's opinion forecloses a due process challenge to awards of punitive damages or the method by which they are imposed, and I adhere to my comments in Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 86-89, 100 L.Ed.2d 62, 108 S.Ct. 1645 (1988)(opinion concurring in part), regarding the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages.

Justice O'Connor's concurrence in Bankers Life & Casualty v. Crenshaw was joined in by Justice Scalia.

Further, in Smith v. Wade, 461 U.S. 30 (1983), Chief Justice Rehnquist wrote a sharp dissent against the allowance of punitive damages in 42 U.S.C. Section 1983 actions.

1. COLORADO LAW VIOLATES DUE PROCESS BY ALLOWING THE JURY TO AWARD PUNITIVE DAMAGES WITHOUT ADEQUATE STANDARDS.

Punitive damages must be awarded under constitutionally adequate standards to guide jurors and courts as to when they should be imposed, and as to how much is appropriate to punish and deter. Mathews v. Eldridge, 424 U.S. 319, 334 (1976); Coates v. Cincinnati, 402 U.S. 611, 614 (1971); Kollender v. Lawson, 461 U.S. 352, 358 (1983); Bankers Life & Casualty v. Crenshaw, 486 U.S. 71 (1988)(concurring opinion); Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. ___, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989).

Under Colorado law, punitive damages are a creature of statute, i.e., Section 13-21-102 C.R.S. (1973). That statute, as it existed at the time this action arose, did not contain standards adequate

to meet the requirements of due process. It provided as follows:

> **Exemplary damages.** In all civil actions in which damages are assessed by a jury for a wrong done to the person, or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings, the jury, in addition to the actual damages sustained by such party may award him reasonable exemplary damages.

This statute and the punitive damages instruction given in this case (Statement of Facts, supra, Par. 10) violated due process because they allowed the jury to award punitive damages in any amount it deemed reasonable for conduct which was no more offensive than insulting. The decision as to whether or not to award punitive damages and the amount thereof was left to the moral discretion of the jury.

The constitutional invalidity of this type of situation was described by this

Court in Coates v. Cincinnati, 402 U.S. 611, 614 (1971) as follows: "Many types of behavior can be restricted or even prohibited but not constitutionally, 'through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a (law enforcement officer) is annoyed . . .'" Nor may juries be allowed to pursue their personal predilections. Kollender v. Lawson, 461 U.S. 352, 358 (1983); and Smith v. Goguen, 415 U.S. 566, 575 (1974).

After this case arose, the Colorado legislature amended Section 13-21-102 C.R.S. to adopt certain standards to guide jurors and courts. It now provides as follows:

> **Exemplary damages.** (1) (a) In all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained

of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages. The amount of such reasonable exemplary damages shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party.

(b) As used in this section, "willful and wanton conduct" means conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff.

(2) Notwithstanding the provisions of subsection (1) of this section, the court may reduce or disallow the award of exemplary damages to the extent that:

(a) The deterrent effect of the damages has been accomplished; or

(b) The conduct which resulted in the award has ceased; or

(c) The purpose of such damages has otherwise been served.

(3) Notwithstanding the provisions of subsection (1) of this section, the court may increase any award of exemplary damages, to a sum not to exceed three times the amount of actual damages, if it is shown that:

(a) The defendant has continued the behavior or repeated the action which is the subject of the claim

against the defendant in a willful and wanton manner, either against the plaintiff or another person or persons, during the pendency of the case; or

(b) The defendant has acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the damages of the plaintiff when the defendant knew or should have known such action would produce aggravation.

(4) One-third of all reasonable damages collected pursuant to this section shall be paid into the state general fund. The remaining two-thirds of such damages collected shall be paid to the injured party. Nothing in this subsection (4) shall be construed to give the general fund any interest in the claim for exemplary damages or in the litigation itself at any time prior to payment becoming due.

(5) Unless otherwise provided by law, exemplary damages shall not be awarded in administrative or arbitration proceedings, even if the award or decision is enforced or approved in an action commenced in a court.

(6) In any civil action in which exemplary damages may be awarded, evidence of the income or net worth of a party shall not be considered in determining the appropriateness or amount of such damages.

The amended punitive damage statute is still deficient because it fails to

guide the jurors as to the circumstances in which fraud, malice or willful and wanton conduct should be punished and fix a definite upper limit therefor, such as a maximum fine in a criminal case. Limiting the punitive damages to an amount not to exceed the actual damages may only encourage a jury to award more actual damages so as to increase the punitive damage award.

Also, amended Section 13-21-102 fails to provide for a bifurcated trial, where the trial is divided between one addressing liability, wherein the burden of proof is by a preponderance of the evidence, and one focusing on punitive damages, wherein the burden of proof is beyond a reasonable doubt. Colorado law provides that punitive damages must be proven beyond a reasonable doubt. Section 13-25-127(2), C.R.S. (1973).

Given meaningful standards, and a bifurcated trial, punitive damages would not have been awarded in this case. Firstly, the record here shows that this was a single, isolated event involving only Ellis. There is no evidence that Buckley had wronged any other persons to whom he administered polygraph examinations or interviewed. Secondly, there is no evidence that Reid was some fly-by-night investigative firm operating without scruples on the edge of the law. In fact, John E. Reid (who founded the Reid organization in 1947) and Professor Fred E. Inbau co-authored the authoritative texts in the field, i.e., "Truth and Deception: The Polygraph ('Lie-Detector') Technique" (The Williams & Wilkins Co., 1966 and 1977), and "Criminal Interrogations and Confessions" (The Williams & Wilkins Co., 1962 and 1967). There is

nothing in this record to show that Buckley and Reid needed strong punishment to "straighten them out," so to speak.

2. COLORADO LAW VIOLATES DUE PROCESS BY ALLOWING THE JURY TO DOUBLE UP THE PUNISHMENT BY AWARDING PUNITIVE DAMAGES IN CASES OF OUTRAGEOUS CONDUCT.

The tort of outrageous conduct is itself punitive in nature. Givelber, The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct, 82 Colum. L. Rev. 42 (1982). Unlike other torts which compensate victims for their injuries, damages for the tort of outrageous conduct often depend more on the character of the conduct than the extent of the plaintiff's injury. The emotional damages awarded normally exceed both the plaintiff's out-of-pocket expenses due to the injury and

any economic goal which the defendant may have sought through his outrageous conduct. Therefore, according to Professor Givelber, emotional damages in outrageous conduct cases serve the policy of deterrence, which also underlies punitive damages. Id. at 52-54.

Ellis had no out-of-pocket expense regarding her claim for outrageous conduct. She did not consult a psychiatrist or psychologist. She did not have any counseling, other than from her pastor. She did not take any prescription medication -- just an aspirin or two for headaches (Tr. Vol. IV, pp. 154-155). At most, Ellis suffered a few minutes of tears near the end of the post-test interview and an evening of being upset (Tr. Vol. III, pp. 112-114 and Tr. Vol. IV, p. 595).

The jury awarded Ellis $48,000 on her claim for outrageous conduct to punish Buckley and Reid. That should have been enough for the small amount of emotional distress suffered by Ellis. But it was not. Given the opportunity to do so under Colorado law, the jury doubled up the punishment by also awarding Ellis $125,000 on her claim for punitive damages.

Justice Hodges, in his dissent to the decision of the Court of Appeals, stated:

> I would also reverse that part of the judgment awarding $125,000 to the plaintiff as exemplary damages on her claims of outrageous conduct and negligence, and remand to the trial court for a new trial on exemplary damages only.
>
> I believe the $125,000 is not sustainable for two reasons.
>
> First, there is a real and significant question of law concerning whether this plaintiff may be awarded $48,000 in damages for outrageous conduct and also be awarded $125,000

> as exemplary damages for outrageous conduct and negligence. Exemplary damages and damages for outrageous conduct are both directed toward deterrence and as punishment for intentional or reckless misconduct. Therefore, it would appear that the part of the exemplary damage award applicable to outrageous conduct is duplicative of the award for outrageous conduct. On this basis, the defendant is being doubly punished. (App., infra, B 13 and B 14).

As pointed out by Justice Hodges, in jurisdictions other than Colorado, the courts have declined to award both punitive damages and damages for outrageous conduct because they are duplicative. See, e.g., Knierim v. Izzo, 22 Ill.2d 73, 174 N.E.2d 157, 162 (1961). In that case, the Illinois Supreme Court adopted the tort of outrageous conduct. The Court, however, concluded that punitive damages could not be sanctioned as an additional recovery in such an action:

> There remains the question of whether a request for punitive damages in such an action is proper. Whether punitive damages may be assessed in

> a particular case is properly a question of law. (Citation omitted.) Generally, such damages may be recovered in cases where the wrongful act complained of is characterized by wantonness, malice, oppression, or circumstances of aggravation. (Citation omitted.) The alleged conduct of the defendant in intentionally causing the severe emotional disturbance is characterized by these elements. Indeed, it is the outrageous nature of this conduct that forms the basis of the action.
>
> We believe, nevertheless, the punitive damages cannot be sanctioned as an additional recovery in such an action. Since the outrageous quality of the defendant's conduct forms the basis of this action, the rendition of compensatory damages will be sufficiently punitive.

Doubling up the damages is a violation of due process. The fact that punishment, i.e., retribution and deterrence, is imposed in civil actions among private litigants does not insulate the matter from due process scrutiny. A. B. Small v. American Sugar Refining Co., 267 U.S. 233, 239 (1925); Jordan v. DeGeorge, 341 U.S. 223, 231 (1951); Giaccio v.

Pennsylvania, 382 U.S. 399, 401-403 (1966); and Jacobs v. Board of School Commissioners, 490 F.2d 601, 605 (7th Cir. 1973).

The level of scrutiny should be similar to that applied to criminal sanctions. As noted in prior decisions of this Court, punitive damage awards are quasi-criminal (Smith v. Wade, 461 U.S. 30, 59 (1983), Rehnquist, J. dissenting); serve the same function as criminal penalties (Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 82-84 (1971), Marshall J. dissenting); and are private fines imposed to punish and deter conduct (Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). When so scrutinized, it is evident that allowing a jury to double up the punishment in outrageous conduct cases violates due process.

3. JURY VERDICTS TOTALING $247,000 IN THIS CASE VIOLATED DUE PROCESS BY BEING GROSSLY EXCESSIVE AND DISPROPORTIONATE.

In Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. ___ , 109 S.Ct. 2909, 2923, 106 L.Ed.2d 219 (1989), Justice Brennan, in his concurrence, suggested that Due Process forbids excessive damages in civil cases, stating:

> Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damage awards that are 'grossly excessive,' Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909), or 'so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable,' St. Louis, I.M.&S.R. Co. v. Williams, 251 U.S. 63, 66-67 (1919); see also Southwestern Telegraph & Telephone Co. v. Danaher, 238 U.S. 482, 491 (1915); Missouri Pacific Railway Co. v. Humes, 115 U.S. 512, 522-523 (1885).

The economic damage sought by Ellis was $11,400 -- $8,400 for lost wages

and $3,000 for lost medical benefits related to the delivery of her first child (Tr., Vol. III 141 and 144). In his closing arguments, Ellis' attorney told the jury:

> I think in terms of damages. Tammie's economic damages are quite clear. She lost her job; she was out of the market for about a year; she lost medical benefits worth $3,000, and what amounts to a year's wages at her level -- were $8,400, so that's $11,400." (Tr., Vol. VI, p. 981).

Nonetheless, the jury awarded Ellis $74,000 for professional negligence, as well as $48,000 for outrageous conduct and $125,000 for punitive damages -- a total of $247,000, as against $11,400 in economic damages.

This Court has expressed concern for proportionality of punishment. The general rule is that the punishment must not be grossly out of proportion to the severity of the offense. (Trop v. Dulles,

356 U.S. 86 (1958); Gregg v. Georgia, 428 U.S. 153 (1976); Pyler v. Doe, 457 U.S. 202 (1982); and Solem v. Helm, 463 U.S. 277 (1983).

The $247,000 awarded by the jury did not fit the harm suffered by Ellis or the offensiveness of Buckley's conduct. At most, Ellis suffered a few minutes of tears near the end of the post-test interview and an evening of being upset. (Tr. Vol. III, pp. 112-114, and Tr. Vol. IV, p. 595). At most, Buckley made a mistake in scoring Ellis' polygraph charts, finding her deceptive rather than inconclusive. Neither of Ellis' experts found that Ellis' charts were truthful. Although Ellis complained about the manner and period of time during which she was interviewed following the polygraph examination, neither of her experts testified that

Buckley treated Ellis improperly or that he should not have questioned her as he did or for as long as he did (Tr. Vol. IV, pp. 204-304 (Backster) and Tr. Vol. IV, pp. 309-329 (Smith)).

Assuming Buckley's conduct was criminal, no court would have been allowed to fine him $247,000. The jury verdicts totaling that amount violated due process. They were grossly excessive and disproportionate to both the harm suffered by Ellis and the offensiveness of Buckley's conduct.

4. THE VIOLATION OF DUE PROCESS IN THIS CASE WAS NOT CURED BY THE REMITTITUR GRANTED BY THE TRIAL COURT ON THE AWARD FOR PROFESSIONAL NEGLIGENCE AND THE JUDICIAL REVIEW OF THE AWARDS FOR OUTRAGEOUS CONDUCT AND PUNITIVE DAMAGES.

The trial court granted the motion for a new trial on the professional negligence claim subject to Ellis' accepting a remittitur in the amount of $62,000 (App., infra, A 5). Ellis

accepted the remittitur and the verdict was reduced from $74,000 to $11,400, which consisted of $8,400 in lost wages and $3,000 in lost medical benefits related to the delivery of Ellis' first child.

However, the remittitur did not cure the violation of due process resulting from the award of $48,000 for outrageous conduct and the award of $125,000 for punitive damages. Together, they are grossly excessive and disproportionate. The problem is that neither the trial court nor the Court of Appeals applied meaningful standards in reviewing these awards.

With respect to Ellis' claim for outrageous conduct, the trial court stated that it "should not and will not set aside a verdict as here entered unless it is grossly and manifestly unjust or

excessive or unless it is the result of bias, prejudice or passion." (App., infra, A 7). Regarding Ellis' claim for punitive damages, the trial court stated that while it did "believe the award was extremely high based upon the evidence in this case, the Court cannot say or find, as a matter of law, that the verdict was excessive or that the jury was motivated by passion or prejudice in reaching its verdict." (App., infra, A 7 and A 8).

The majority on the Court of Appeals did not address the question of whether the outrageous conduct award was excessive, although it was raised by Buckley and Reid. With respect to punitive damages, it merely stated: "An award of damages will not be disturbed on appeal unless it is completely unsupported by the record. Meiter v. Cavanaugh, supra." (App., infra, B 10).

The standard applied by the trial court was whether the outrageous damage award and punitive damage award was:

a. grossly and manifestly unjust or excessive, or

b. the result of bias, prejudice or passion.

These are both subjective value judgments and essentially unreviewable. What would be grossly and manifestly unjust or excessive to one trial judge might not be to another trial judge. Also, how can a trial judge discern bias, prejudice or passion on the part of the jury? The fact is that it cannot do so in any objective way. It is not customary for a trial judge to question the jurors on how they arrived at their damage awards and the trial judge did not do so in this case.

The standard applied by the majority on the Court of Appeals was whether the

punitive damage award was completely unsupported by the record. That is not a meaningful standard. Presumably, a "scintilla" of evidence would be enough to support a punitive damage award. In his dissent, Justice Hodges found that the punitive damage award was not sustainable because it constitued double punishment and because it did not bear some relation to actual damages (App., infra, B 13 and B 14). Also, Supreme Court of Colorado Justice Rovira would have granted certiorari on "whether the Court of Appeals erred in upholding the jury's exemplary damage award." (App., infra, D 1 and D2).

Where, as here, there are no meaningful standards to guide the trial court and Court of Appeals, their review of the amount of damages awarded by the jury is meaningless. Courts, no more

than juries, can be given unbridled discretion to determine the amount of punishment after the defendant has acted. (Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972); Marks v. United States, 430 U.S. 188, 191-192 (1977); Bouie v. Columbia, 378 U.S. 347 (1964). The vice of vague standards is that no meaningful review can be made. (Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984)).

Neither the remittitur granted by the trial court on Ellis' claim for professional negligence, nor the review of the awards for outrageous conduct and punitive damages cured the constitutional defect in this case.

CONCLUSION

This Court has an opportunity in Pacific Mutual to require that punitive damages be awarded in a way which complies

with due process standards. Certain of the issues in Pacific Mutual are also found in this case. However, Pacific Mutual did not involve a claim for outrageous conduct and does not contain a question regarding double punishment by awarding punitive damages in outrageous conduct cases. That question needs to be resolved and can be resolved in this case. Buckley and Reid respectfully request that a petition for writ of certiorari be granted in this case.

July 26, 1990

Respectfully submitted,

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APPENDICES

DISTRICT COURT, COUNTY OF ADAMS, STATE OF COLORADO

CIVIL ACTION NO. 84CV1083, DIVISION A

RULINGS REGARDING DEFENDANTS' MOTIONS FOR POST-TRIAL RELIEF - RULE 59 C.R.C.P.

TAMMIE R. ELLIS,

Plaintiff,

vs.

FASHION BAR, INC., a Colorado corporation, DAVID M. BUCKLEY, an employee of John E. Reid & Associates, Inc., and JOHN E. REID & ASSOCIATES, INC., an Illinois corporation,

Defendants.

Defendants have filed their "Motion for Post-Trial Relief - Rule 59, C.R.C.P." The Motion requests judgment notwithstanding the verdict, new trial or remittitur as against verdicts for the plaintiff on the theories of professional negligence,

outrageous conduct, and punitive damages.

I.

Judgement Notwithstanding the Verdict

A. Professional Negligence Claim

Defendants move for judgment notwithstanding the verdict pursuant to C.R.C.P. 59 (e) alleging (1) the evidence to support the verdict was insufficient as a matter of law, and (2) no genuine issue of material fact exists concerning the issue of professional negligence and defendants are entitled to judgment as a matter of law.

The record shows the evidence on trial was lengthy, disjointed and in many aspects confusing. However, when considered as a whole, and in the light most favorable to the verdict, the Court finds it was sufficient to sustain the verdict

of the jury. Clearly, more than one conclusion could have been drawn by reasonable minds including a conclusion that defendants were professionally negligent. While defendants in their post-trial motion focus upon the test scoring alone, there was evidence to show both the standard of care and a breach thereof on many aspects of the polygraph examination involved in this action. Genuine issues did exist which were properly within the province of the jury to determine.

II.

Motion for New Trial or Remittitur

A. Negligence Claim

Defendants' Motion for New Trial on the negligence claim is predicated soley upon the assertion that the damages awarded were excessive. A new trial may

be granted under C.R.C.P 59 (d) (5) in such instances. In the alternative, the defendant seeks a remittitur of all amounts in excess of $11,400.00. The Court agrees with the Defendant in this argument.

The jury's verdicts on the negligence, outrageous conduct and punitive damage claims were separately stated. As such, there is no confusion as to the amount specifically awarded for defendants' negligence. The evidence presented on trial would support an award of actual damages based upon defendants' negligence of $8,400.00 in lost wages and $3,000.00 in lost medical insurance benefits. The evidence would support no larger award. The verdict in the amount of $74,000.00 for the negligence claim is grossly and

manifestly excessive considering the evidence in this case. The Court, however, finds the verdict is not the result of any improper bias, prejudice or passion.

Under the circumstances the Court finds that defendants' Motion for a New Trial under C.R.C.P. 59 (d) (5) should be granted conditionally on the negligence claim only. If plaintiff accepts a remittitur of $62,600.00 reducing the negligence claim verdict to $11,400.00, a new trial will not be allowed. Plaintiff should be allowed twenty (20) days to file her election under this order.

B. Outrageous Conduct Claim

Defendant seeks a new trial on plaintiff's outrageous conduct claim. The defendant first argues that the jury was not properly instructed as the Court

refused defendants' tendered instruction, "The emotional distress must be reasonable and justified under the circumstances." Defendant further argues that the damages were excessive and that the verdict was the result of bias and prejudice against the defendants. The Court disagrees with these arguments. The jury was given instructions number 20 through 23 which were directly patterned after Colorado Jury Instructions 2d, Nos. 23:1, 23:2, 23:3, and 23:4 respectively. The instructions properly define, specify and emphasis that the emotional distress suffered must be severe in character. Defendant's offered instruction was based upon but would modify standard instruction 23:4. The modification of the instruction was not required by the evidence in this

case.

The Trial Court should not and will not set aside a verdict as here entered unless it is grossly and manifestly unjust or excessive or unless it is the result of bias, prejudice or passion. The Court could not and will not, under the evidence in this case, enter such a finding.

C. Punitive Damages Claim

Defendants last seek a new trial and/or an order of remittitur as against the jury's verdict in the amount of $125,000.00 against defendants as punitive damages. Defendants argue this verdict is excessive.

While the Court does believe the award was extremely high based upon the evidence in this case, the Court cannot say or find, as a matter of law, that the

verdict is excessive or that the jury was motivated by passion or prejudice in reaching its verdict.

The jury obviously felt the defendant deserved a punitive verdict. The amount of such an award must necessarily rest in the first instance, within the discretion of the trier of fact. Palmer v. A. H. Robbins, Inc., 684, P.2d 187 (Colo. 1984). Considering the nature of the defendants' actions during the post-test interview and the deterrent the award will serve to others, the award appears within the range of the jury's discretion. While there was little information as to the defendants' economic status presented on trial, the Court believes there was sufficient evidence for the jury to infer the economic strength of the defendant and the impact

of such a punitive verdict. As such, the Motion for New Trial and/or remittitur with reference to the punitive damages claim should be denied.

Order

1. Defendants' Motion for New Trial with reference to plaintiff's negligence claim only is granted subject to the plaintiff accepting a remittitur against the verdict in the amount of $62,600.00 reducing the verdict on the negligence claim to $11,400.00. If plaintiff accepts this remittitur within twenty (20) days of this order, the Motion for a New Trial shall be denied.

2. The remainder of the defendants' post-trial motions for judgement notwithstanding the verdict, new trial and/or

remittitur are denied.

Dated this 23 day of July, 1987.

/s/ Donald W. Marshall
Donald W. Marshall, Jr.
District Court Judge

COLORADO COURT OF APPEALS

No. 87CA1322

TAMMIE R. ELLIS,

Plaintiff-Appellee,

v.

DAVID M. BUCKLEY, an employee of John E. Reid & Associates, Inc. and JOHN E. REID & ASSOCIATES, INC. an Illinois corporation,

Defendants-Appellants

Appeal from the District Court
of Adams County
No. 84CV1083

Honorable Donald W. Marshall, Jr., Judge

DIVISION I
Opinion by JUDGE PLANK
Pierce, J., concurs,
Hodges*, J., dissents

JUDGMENT
AFFIRMED

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*Sitting by assignment of the Chief Justice under provisions of the Colo. Const., art. VI, Sec. 5(3), and section 24-51-1105, C.R.S. (1988 Repl. Vol. 10B).

David M. Buckley and his employer, John E. Reid and Associates, Inc., appeal the judgment entered on jury verdicts in favor of plaintiff, Tammie R. Ellis. we affirm.

John E. Reid and Associates, Inc. is in the business of conducting internal theft investigations. It was hired by the plaintiff's employer to investigate some cash shortages that had been discovered at the store where the plaintiff worked.

At the request of her employer, plain-

tiff submitted to a polygraph examination, which was conducted by Buckley and which lasted about fifteen minutes. Buckley interpreted the test results as indicating that plaintiff was being deceptive in her responses. As a result he informed her that she had "failed" the polygraph test, and he proceeded to interrogate her for over two hours in a post-test interview.

During that interrogation, according to the plaintiff, Buckley spoke in a harsh manner and repeatedly asked her if she had not stolen money or goods from her employer. She testified that apparently Buckley did not believe her denials or responses, as he badgered her throughout the interview. Buckley then reported to the plaintiff's employer that his analysis of the polygraph test indicated that

plaintiff was deceptive in her answers. As a result, plaintiff's employment was terminated. As a consequence of losing her job, plaintiff experienced insomnia and other signs of emotional distress for a period of time.

Plaintiff commenced this action, alleging that the defendants had engaged in "outrageous conduct" during the test and post-test interview, and that they were negligent in improperly reporting the results of the polygraph examination. The plaintiff also sought exemplary damages. From a judgment entered upon a jury's verdict in favor of the plaintiff on all claims, this appeal followed.

I.

Defendants contend that the trial court erred in denying their motion for a

directed verdict on the plaintiff's claim for outrageous conduct. We disagree.

To prevail on a claim of outrageous conduct, plaintiff must establish that the defendants, by extreme and outrageous conduct, intentionally or recklessly caused her severe emotional distress. Rugg v. McCarty, 173 Colo. 170, 476 P.2d 753 (1970). Outrageous conduct is that which is so "outrageous and extreme as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." Hansen vs. Hansen, 43 Colo. App. 525, 608 P.2d 364 (1979).

The trial court is to determine in the first instance whether reasonable persons could differ on the outrageousness issue. Meiter v. Cavanugh, 40 Colo. App.

454, 580 P.2d 399 (1978). If answered in the affirmative, the question of whether conduct is sufficiently outrageous to warrant an award of damages is one for the jury.

Here, the evidence showed that Buckley escorted the 20-year-old plaintiff to a small interrogation room where he questioned her for over two hours without telling her she could leave. Although her background was exemplary and no evidence (besides the polygraph test) indicated any wrong doing, he repeatedly accused her of theft despite her constant denials, and continued the interrogation, even though she was crying, in an attempt to obtain a confession from her.

In denying the defendant's motion for directed verdict on the outrageous conduct

claim, the trial court stated that:

> "In the light most favorable to the plaintiff...I have no trouble with my duty as a judge of this court to say that the conduct would fit within the extreme and outrageous conduct."

We agree with the trial court that reasonable members of the community could conclude that defendant Buckley's conduct here was outrageous. See Rugg v. McCarty, supra. Accordingly, the trial court did not err in denying the defendants' motion for a directed verdict.

II.

Defendants next contend that the claim of negligence should not have been submitted to the jury because plaintiff failed to establish a standard of care. We disagree.

Here, to prevail on a claim of negli-

gence, the plaintiff must establish that the defendant breached a duty of care in conducting the polygraph test and in analyzing and reporting the results, thereby causing damages to the plaintiff. See Palmer v. A H. Robins Co., 684 P.2d 187 (Colo. 1984).

A legal duty to use reasonable care arises in response to a foreseeable risk of harm to others. Palmer v. A.H. Robins Co., supra. The standard of care owed by a person in the business of providing unique services to those submitting to his services is the duty to exercise the ordinary skill and competence of other persons in the business of providing similar services. See Metropolitan Gas Repair Service, Inc. v. Kulik, 621 P.2d 313 (Colo. 1980).

Here, we conclude that the evidence presented established the standard of care. Numerous expert witnesses, in the business of conducting polygraph tests, testified to the standard of care that is adhered to in the business. Furthermore, both parties' experts testified that they would have concluded that the plaintiff's test results were inconclusive. Hence, there was evidence indicating both a standard of care, and a breach of that standard, and the matter became one for the jury to resolve.

III.

Lastly, the defendants contend that the evidence in the record does not support an award of exemplary damages. We disagree.

To award exemplary damages, the wrong-

ful act must have been accompanied by a wrongful motive or a reckless disregard of the plaintiff's rights. Mari v. Wagner Equipment Co., 721 P.2d 1208 (Colo. App. 1986). An award of damages will not be disturbed on appeal unless it is completely unsupported by the record. Meiter v. Cavanaugh supra. Here, we conclude that the evidence in the record supports the jury's award, and thus, we will not disturb the exemplary damage award on appeal.

Accordingly, the judgment is affirmed.

JUDGE PIERCE concurs.

JUDGE HODGES dissents.

JUSTICE HODGES dissenting.

I respectfully dissent.

I would reverse that part of the judgment and jury ward of $48,000 for the plaintiff on her outrageous conduct claim. I perceive nothing from the plaintiff's testimony and other evidence which approaches outrageous conduct on the part of defendant Buckley during the polygraph test and subsequent interview with the plaintiff.

Viewing all the evidence in a light most favorable to the plaintiff, I cannot conclude that defendant Buckley's questions, comments, and conduct during the interview with the plaintiff were so egregious as to be actionable. That is, in my view, they were not so outrageous in character and so extreme in degree that a

reasonable member of the community would regard them as atrocious, going beyond all possible bounds of decency, and utterly intolerable in a civilized community. See Rugg v. McCarthy, 173 Colo. 170, 476 P.2d 753 (1970) and Hansen v. Hansen, 43 Colo. App. 525, 608 P.2d 364 (1979).

According to the testimony of the plaintiff, defendant Buckley at times during the post-test interview spoke to her in a harsh manner and repeatedly asked her if she had not in fact stolen money or goods from her employer. She testified that apparently he did not believe her denials. She also testified that near the conclusion of the interview she began to cry and defendant Buckley handed her a tissue and then left the room at her request. The questioning ended shortly

thereafter. I would classify this as no more than an unpleasant experience for the plaintiff who was anquished by the fact that defendant Buckley would not believe her denials of wrongdoing.

It is my strong veiw that the evidence falls far short of showing a cause of action for outrageous conduct. Hence, I would hold that the trial court erred in denying defendant's motion for a directed verdict on the outrageous conduct claim.

I would also reverse that part of the judgment awarding $125,000 to the plaintiff as exemplary damages on her claims of outrageous conduct and negligence, and remand to the trial court for a new trial on exemplary damages only. I believe the $125,000 award is not sustainable here for two reasons.

First, there is a real and significant questions of law concerning whether this plaintiff my be awarded $48,000 in damages for outrageous conduct and also be awarded $125,000 as exemplary damages for outrageous conduct and negligence. Exemplary damages and damages for outrageous conduct are both directed toward deterrence and as punishment for intentional or reckless misconduct. Therefore, it would appear that that part of the exemplary damages award applicable to outrageous conduct is duplicative of the award for outrageous conduct. On this basis, the defendant is being doubly punished.

This issue has not been specifically resolved in Colorado. In Vogel v. Carolina International, Inc., 711 P.2d 708 (Colo. App. 1985), the issue was raised ,

but not resolved in a situation in which there were two plaintiffs, one of whom was awarded punitive damages and the other was awarded damages arising out of the defendant's outrageous conduct. Under the ruling there, the duplicative damages issue, if applicable, would pertain only to cases involving a single victim.

In other jursidictions, the courts have declined to award both punitive damages and damages for outrageous conduct because they are duplicative. See, e.g. Knierim v. Isso., 22 Ill 2d 73, 174 N.E.2d 157 (1961).

Second, on the claim for negligence, the jury returned a verdict in favor of the plaintiff and awarded her damages of $74,000. In its ruling on defendants' post-trial motions, the trial court stated

that this award "is grossly and manifestly excessive considering the evidence in this case." The trial court then made a finding that the evidence of damages resulting from defendants' negligence would support an award of $11,400 and ordered a new trial on negligence damages unless plaintiff accepted a remittitur of $62,600. The plaintiff accepted the remittitur. Thus, as to the defendants' negligence, the award is now $11,400 rather than the $74,000 awarded by the jury.

Since exemplary damages or punitive damages must bear some relation to the actual damages, Frick v. Abell, 198 Colo. 508, 602 P.2d 852 (1979), the amount of exemplary damages applicable to defendant's negligence should be reconsidered

for this reason also. I also agree with the defendant's contention that there was a complete lack of sufficient evidence of the economic status of the defendants to support any substantial award of exemplary damages. Higgs v. District Court, 713 P.2d 840 (Colo. 1985).

THE COURT OF APPEALS OF

THE STATE OF COLORADO

Case Number 87CA01322

ORDER

TAMMIE R. ELLIS v. DAVID M. BUCKLEY, et al

Upon consideration of the Petition for Rehearing filed by the Appellant herein, said Petition is hereby DENIED. J. HODGES WOULD GRANT. It is ordered that issuance of the Mandate hereby be, and the same hereby is, stayed to and including 2-12-90 provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado the stay shall remain in effect until disposition of the within cause by the Supreme Court.

Plank, J.

Pierce, J.

Hodges, J.

DATED: January 11, 1990

SUPREME COURT, STATE OF COLORADO
Case No. 90SC59
Certiorari to the Colorado
Court of Appeals 87 CA 1322
Adams County District Court 84 CV 1083

ORDER OF COURT

DAVID M. BUCKLEY, an employee of John E. Reid & Associates, Inc., and JOHN E. REID & ASSOCIATES, INC., an Illinois corporation,

Petitioners,

v.

TAMMIE R. ELLIS,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said

Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, APRIL 30, 1990.

JUSTICE ROVIRA would grant as to the following issue:

Whether the court of appeals erred in upholding the jury's exemplary damages award.

SUPREME COURT, STATE OF COLORADO
CASE NO. 90SC59
CERTIORARI TO THE COLORADO
COURT OF APPEALS, #87CA1322

ORDER OF COURT

DAVID M. BUCKLEY, an employee of John E. Reid & Associates, Inc., and JOHN E. REID & ASSOCIATES, INC., an Illinois corporation,

Petitioners,

vs.

TAMMIE R. ELLIS,

Respondent.

Upon consideration of the Petition for Reconsideration on Denial of Petition for Certiorari and the Respondent's Motion to Strike Petitioner's Unauthorized Petition for Reconsideration of Denial of Petition for Writ of Certiorari filed in the above cause, and now being sufficiently

advised in the premises,

IT IS THIS DAY ORDERED that said Respondent's Motion to Strike shall be, and the same hereby is, GRANTED.

BY THE COURT, MAY 11, 1990.

Appeal from the District Court of
Adams, to the Colorado Court of Appeals.
Opinion issued & Judgment entered 11-16-89,
before Plank, Pierce, J., concurs
Hodges, J., Dissents

COURT OF APPEALS, STATE OF COLORADO
2 East Fourteenth Avenue, Suite 300
Denver, Colorado - 80203
(303) 837-3785

M A N D A T E

Court of Appeal No. 87CA1322
Trial Court No. 84CV1083

TAMMIE R. ELLIS vs. DAVID M. BUCKLEY ET AL

This cause came to be heard on the record on appeal from the District Court of the County of Adams and was argued by counsel, on consideration thereof, it is ordered that the Judgement of said Court is JUDGMENT AFFIRMED.

DATE: May 10, 1990 JAMES G. BENWAY
Clerk of the Court

/s/ Catherine Cunningham
Catherine Cunningham
Deputy Court Clerk

COURT OF APPEALS, STATE OF COLORADO
Case Number: 87CA1322
Trial Court No. 84CV1083

MANDATE RECALL

TAMMIE ELLIS vs. DAVID M. BUCKLEY ET AL

Pursuant to the Court's order of May 18, 1990 it is this day ordered that the Mandate issued May 10, 1990, be RECALLED.

Dated: May 18, 1990

FOR THE COURT:

/s/ James G. Benway
James G. Benway
Clerk of the Court

Supreme Court, U.S.
FILED
SEP 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-191

In The

Supreme Court of the United States

October Term, 1990

DAVID M. BUCKLEY and
JOHN E. REID AND ASSOCIATES, INC.,
an Illinois corporation,

Petitioners,

v.

TAMMIE R. ELLIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

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BEST AVAILABLE COPY

RESTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court has jurisdiction where no constitutional or federal question was ever raised in either the Colorado trial or appellate courts.

2. Whether Colorado law violates due process by allowing the jury to award punitive damages under adequate standards provided by Colorado statutes, jury instructions, and case law?

3. Whether Colorado law violates due process by allowing the jury to award both punitive damages and separate compensatory damages for intentional infliction of emotional distress (outrageous conduct) under appropriate circumstances?

4. Whether the award of punitive damages was both warranted and reasonable under the unique facts of this case.

5. Whether any alleged violation of due process in this case was cured by the remittitur granted by the trial court, and Colorado appellate judicial review of the awards for outrageous conduct and punitive damages under Colorado statutes and common law?

6. Whether all issues presented are now moot as a matter of law.

TABLE OF CONTENTS

PAGE

RESTATEMENT OF QUESTIONS PRESENTED.. i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iii

SUMMARY OF REASONS FOR DENYING THE PETITION..... 1

STATEMENT OF THE CASE..... 4

I. INTRODUCTION..... 4

II. STATEMENT OF FACTS..... 11

ARGUMENT/REASONS FOR DENYING THE PETITION..... 31

I. PETITIONERS HAVE MISSTATED THE EVIDENCE 31

II. THIS COURT LACKS JURISDICTION..33

III. DEFENDANT-PETITIONERS HAVE MISSTATED THE FACTS, EVIDENCE AND LAW OF THIS CASE TO CONFORM THEM TO ANOTHER CASE PRESENTLY BEFORE THE COURT UNDER VERY DIFFERENT FACTS...41

IV. EVEN ASSUMING ARGUENDO THAT A PROPER ISSUE UNDER FEDERAL LAW EXISTS, THE STANDARDS FOR THE IMPOSITION OF EXEMPLARY DAMAGES UNDER COLORADO STATUTES, JURY INSTRUCTIONS AND CASE LAW ARE CONSISTENT WITH THE DUE PROCESS CLAUSE AND THE HOLDINGS OF THIS COURT. THE CASES CITED BY PETITIONERS

ARE WHOLLY DISTINGUISHABLE AND NOT CONTROLLING. THE EXEMPLARY DAMAGES AWARDED BY THE JURY IN THE PRESENT CASE ARE NOT GROSSLY EXCESSIVE, ARE CLEARLY REASONABLE, AND ARE IN AN APPROPRIATE RATIO TO THE COMPENSATORY DAMAGES ALSO AWARDED BY THE JURY.....43

V. THE AWARD OF BOTH "EXEMPLARY" OR "PUNITIVE" DAMAGES (TO PUNISH THE WRONGDOER AND SET AN EXAMPLE) AND DAMAGES FOR OUTRAGEOUS CONDUCT (COMPENSATORY DAMAGES FOR INJURIES CAUSED BY INTENTIONAL OR RECKLESS INFLICTION OF EMOTIONAL DISTRESS) IS IN NO SENSE A "DOUBLING UP", DOES NOT VIOLATE DUE PROCESS OR EQUAL PROTECTION, AND DOES NOT EVEN RAISE A CONSTITUTIONAL QUESTION.....51

VI. ALL VIABLE ISSUES ARE NOW MOOT AS A MATTER OF LAW.....54

CONCLUSION.....56

TABLE OF AUTHORITIES

Case — Page

Allegheny County v. Frank Mashuda Co., 360 U.S. 185 (1959).....37

Beebe v. Pierce, 185 Colo. 34, 521 P.2d 1263 (1974).....45

Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 408 F.Supp. 1219 (D.Colo. 1976), modified on other grounds and aff'd, 561 F.2d 1365 (10th Cir. 1977), cert. denied, 434 U.S. 1052 (1976).....9,45

Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. __, 109 S.Ct. 2909 (1989).....49

Carlson v. Green, 446 U.S. 14, 22 n.9 (1980).....49

Coale v. Dow Chemical Co., 701 P.2d 885 (Colo. App. 1985).....46

Comstock v. Group of Institutional Investors, 335 U.S. 211 (1948).....38

Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co., 252 U.S. 388 (1920).....41

DeBacker v. Brainard, 396 U.S. 28 (1969).....55

DeCicco v. Trinidad Area Health Association, 573 P.2d 559 (Colo. App. 1977).....52

Dick v. New York Life Ins. Co., 359 U.S. 437 (1959).....36

E.F. Hutton & Co. v. Anderson, 42 Colo. App. 497, 596 P.2d 413 (1979).....45,48

Enright v. Graves, 560 P.2d 851 (Colo. 1977).....45,52,54

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968), rehearing denied 393 U.S. 901 (1968)..55

Fletcher v. Western National Life Insurance Co., 89 Cal. Rptr. 78 at 95 (C.A. 4th Dist., 1970).....53

Frick v. Abell, 602 P.2d 852 (1979)...47

Gilardi v. Schroeder, 672 F.Supp. 1043 (N.D. Ill. 1986).....53

Hull v. Burr, 234 U.S. 712 (1914).....36

Kimball v. Kimball, 174 U.S. 158 (1899).....55

Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E. 2d 157 (1961).....52,53

Leidhold v. District Court, 619 P.2d 768 (Colo. 1980).....46

Little v. Bowers, 134 U.S. 547 (1890).55

Lynk v. LaPorte Superior Court No. 2, 789 F.2d 554 (CA 7 Ind. 1986).....39

Mailloux v. Bradley, 643 P.2d 797 (Colo. App. 1982).....47

Malandris v. Merrill Lynch, Pierce, Fenner & Smith, 703 F.2d 1152 (1981).....9,53

Mayor of City of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974).....38

Meiter v. Cavanaugh, 580 P.2d 399 (Colo. 1978).....52

Mince v. Butters, 200 Colo. 501, 616 P.2d 127 (1980).....46

Montgomery Wards Co., Inc. v. Andrews, 736 P.2d 40 (Colo. App. 1987).....8,51

New Haven Inclusion Cases, 399 U.S. 392 (1970).....37

New York Times v. Sullivan, 376 U.S. 254 (1964).....6

Pacific Mutual v. Haslip, 110 S.Ct. 1780, 108 L.Ed. 2d 782, cert granted April 2, 1990.....5,34,41,42,43,48

Palmer v. A.H. Robbins Co., Inc., 684 P.2d 187 (Colo. 1984).....9,46,47,48

Parker v. McLain, 237 U.S. 469 (1915).36

Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947).....6

Rohr Aircraft Corp. v. County of San Diego, 362 U.S. 628 (1960).....39

Rugg v. McCarty, 173 Colo. 170, 476 P.2d 753 (1970).....52

Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc., 360 U.S. 334 (1959).....36

San Juan Light & Transit Co. v. Requena, 224 U.S. 89 (1912).....38

Shelley v. Kraemer, 334 U.S. 1 (1948).37

Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950).....37

Socialist Labor Party v.Gilligan, 406 U.S. 583 (1972).....6

Specht v. Jensen, 832 F.2d 1516 (10th Cir. 1987).....51

Spiegel's Estate v. C.I.R., 335 U.S. 701 (1949).....37

State Rubbish Etc. Ass'n v. Silizmoff, 38 Cal.2d 330, 240 P.2d 282 (1952)....53

Tacon v. Arizona, 410 U.S. 351 (1973).31

Texas & P.R.Co. v. Abilene Cotton Oil Co., 204 U.S. 426.....38

Thomas v. Taylor, 224 U.S. 73 (1912)..38

United Rys & Electric Co. of Baltimore v. West, 280 U.S. 234 (1930).....37

UNR Industries, Inc. v. Continental Ins. Co., 607 F.Supp. 855 (D.C. Ill. 1984).....53

U.S. v. Durham Lumber Co., 363 U.S. 522 (1960).....37

U.S. v. Kimball Foods, Inc., 440 U.S. 715 (1979).....37

Walford v. Blinder, Robinson and Co., Inc., 793 P.2d 620 (Colo.App.1990).46,47

Weade v. Dickmann, Wright & Pugh, 337 U.S. 801 (1949).....36,38

Wegner v. Rodeo Cowboy's Ass'n, 290 F. Supp. 369 (D.Colo. 1968) aff'd and rehearing denied, 417 F.2d 881 (10th Cir. 1969), cert. denied, 398 U.S. 903 (1970).....48,52

Williams v. U.S., 341 U.S. 97 (1951)..55

Statutes — Page

28 U.S.C. §1251(a).....33,34

28 U.S.C. §1257.....2,5,34,39,41,58

28 U.S.C. §1257(3).....34

29 U.S.C. §2001, et. seq, Employee Polygraph Protection Act of 1988.....4,7,8,54

C.R.S. §13-21-102.....3,7,41,43,48,54

C.R.S. §13-21-102(1)(a) (1987 Repl.Vol. 6A).....46

Other Authorities — Page

American Constitutional Law, Tribe, 861 - 890 (2nd Ed. 1988).....7

Colorado Appellate Rules (Rule 54).....35

Colorado Jury Intructions - Civ. 2d 5:3 (1980).....44

Restatement (Second) of Torts, §46 (1965).....8,52

Rules of the Supreme Court of the United States, Rule 10.....2,39,54

NO. 90-191

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DAVID M. BUCKLEY and
JOHN E. REID AND ASSOCIATES, INC.,
an Illinois corporation,

Petitioners,

vs.

TAMMIE R. ELLIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

This case comes before the Court on a Petition by defendants-appellants below, for a writ of certiorari.

SUMMARY OF REASONS FOR DENYING THE PETITION

The petition provides no adequate reason for this Court to grant certiorari and should be denied for the following reasons:

1. Petitioners have presented no special or important reasons for granting a review on writ of certiorari pursuant to Rule 10 of the Rules of the Supreme Court of the United States (1990). To the contrary, Petitioners have grossly misstated the facts and are attempting, for the first time, to convert disputed factual issues which have been resolved against them by a jury and affirmed by a state appellate court into novel constitutional questions.

2. This Court lacks jurisdiction since no federal question has ever been previously raised in a Colorado trial or appellate court, thereby divesting this Court of jurisdiction pursuant to 28 U.S.C. §1257.

3. Even assuming arguendo that a proper issue under federal law exists, the standards for the imposition of exemplary damages under Colorado statutes, jury instructions, and case law are consistent with the due process clause and the holdings of this Court. The cases

cited by Petitioner are wholly distinguishable and not controlling. The exemplary damages awarded by the jury in the present case are not grossly excessive, are clearly reasonable, and are in an appropriate ratio to the compensatory damages also awarded by the jury.

4. The award of both exemplary or punitive damages (to punish the wrongdoer and set an example) and damages for outrageous conduct (compensatory damages for injuries caused by intentional or reckless infliction of emotional distress) is in no sense a "doubling up", does not violate due process, and does not even raise a constitutional question.

5. All viable issues are now moot as a matter of law. Colorado amended C.R.S. (1973) §13-21-102 in 1986 to provide an even more detailed statute covering punitive damages, and the Federal Government has pre-empted the area of civil law addressed on this action by

passing the Employee Polygraph Protection Act of 1988, 29 U.S.C. §2001, et. seq.

STATEMENT OF THE CASE

I. INTRODUCTION

Petitioners asserted the issues of due process and equal protection for the first time after they had exhausted their appellate rights in the Colorado judicial system. Following the denial of their Petition for Certiorari to the Colorado Supreme Court, they moved on the 10th day of May, 1990, for the Colorado Supreme Court to reconsider its denial. Since Colorado Appellate Rules provide for no Petition for Reconsideration with regard to a denial of a Petition for Certiorari, on May 11, 1990, the Petition for Reconsideration on Denial of Petition for Certiorari was stricken by the Colorado Supreme Court. Simply stated, raising constitutional issues in this manner was "too little and too late". At no time during the

entire appellate process in the Colorado Court of Appeals, or in their actual Petition for Certiorari to the Colorado Supreme Court, did Petitioners ever raise the constitutional issues now presented to this Honorable Court for the first time.

This Court, therefore, lacks jurisdiction since no federal questions have previously been properly raised in the Colorado trial court, Colorado Court of Appeals, or in the Colorado Supreme Court, as required pursuant to 28 U.S.C. §1257. Stated otherwise, and quite frankly, Petitioners first thought of asserting constitutional issues after becoming aware of the fact that this Court had granted certiorari in a totally different case, Pacific Mutual v. Haslip, 110 S.Ct. 1780, 108 L.Ed.2d 782, cert. granted April 2, 1990.

Petitioners are attempting, for the first time, to convert into novel constitutional questions disputed factual issues which were resolved against them by a jury and affirmed

by the Colorado Court of Appeals. Petitioners now raise constitutional claims that are so vaguely formulated and so lacking in theoretical focus[1] that a favorable ruling on Petitioners' behalf would generate more doubt about the award of punitive damages that it could ever hope to resolve. Such a ruling would do so without the offsetting benefit of having (in this case) a reasonable framework from which to instruct the states about how to bring a law of punitive damages into compliance with federal constitutional standards. A series of clarifying and qualifying decisions from this Court[2] would be

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[1] Constitutional issues must be presented in clear cut and concrete form so that this Court can know exactly the elements of state law that are being called into question. See, Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947); Socialist Labor Party v. Gilligan, 406 U.S. 583, 589 (1972).

[2] Perhaps the most apt illustration of this is the Court's constitutionalization of the law of the defamation in New York Times v. Sullivan, 376 U.S. 254 (1964). In the intervening years, the Court has had to consider and

needed at a time when its dockets are heavily burdened and state legislatures throughout the country are effectively engaged in "tort reform", an important element of which is the examination of procedures and standards associated with the award of punitive damages.[3] The exemplary damages awarded by the jury in the present case are not excessive, are clearly reasonable, and are in appropriate ratio with the compensatory damages also awarded by the jury.[4] The Federal government has now passed the Employee Polygraph Protection Act of 1988 pre-empting this entire area of law to prevent the type of

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decide many cases dealing with the scope of the New York Times rule. Tribe, American Constitutional Law, 861-890 (2nd Ed. 1988).

[3] Colorado is one of the states that has enacted tort reform measures concerning, inter alia, punitive damages. They became effective July 1, 1986. See, C.R.S. §13-21-102, as amended.

[4] The compensatory to punitive ratio is approximately one to one (one to two following court ordered remittitur).

abuse suffered by the plaintiff, thereby rendering all issues raised by Defendant-Petitioners non-viable and moot.[5]

The award of damages for the tort of outrageous conduct[6] are compensatory damages for injuries caused by intentional or reckless infliction of emotional distress. Compensatory damages may be assessed on one who, by extreme or outrageous conduct, intentionally or recklessly causes severe emotional distress to another subjecting him to liability for such emotional distress.[7] Exemplary or punitive damages are awarded to

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[5] See 29 U.S.C. §2001, et. seq.

[6] Montgomery Wards Inc., Co. v. Andrews, 736 P.2d 40 (Colo. App. 1987)

[7] Restatement (Second) of Torts, §46 (1965)

punish the wrongdoer and to set an example.[8] The award of damages for outrageous conduct and punitive damages does not create a "doubling up" of damages nor does it violate due process.[9]

The facts, evidence and law of the case more than adequately support the verdict in this case. The Defendants stipulated to David Buckley's agency. All the experts including Defendants' experts agreed that the results of the polygraph were inconclusive, yet Buckley failed Plaintiff causing her severe financial

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[8] Palmer v. A.H. Robbins Co., Inc., 684 P.2d 187 (Colo. 1984); Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 408 F.Supp. 1219 (D. Colo. 1976), modified on other grounds and aff'd, 561 F.2d 1365 (10th Cir. 1977), cert denied, 434 U.S. 1052 (1976)

[9] Prohibition against double jeopardy relates to criminal or quasi criminal proceedings and not to a civil lawsuit involving an ancillary claim for punitive damages. Palmer v. A.H. Robbins Co., Inc., 684 P.2d 187 (Colo. 1984); Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 703 F.2d 1152, cert.denied, 464 U.S. 824 (C.A. Colo. 1981).

and emotional harm. He interrogated her mercilessly for over two hours. His abuse of authority, and his reckless, willful and wanton disregard for Tammie's rights and feelings, caused the jury to award appropriate punitive damages, as well as compensatory damages for her economic loss and emotional stress caused by his outrageous conduct. The ratio of compensatory damages to punitive damages awarded by the jury is approximately "one to one" and is, therefore, appropriate on its face, especially in light of the fact that Buckley interrogated a young, pregnant, naive and deeply religious girl for 2 to 3 hours after misreading his own graphs with the intention of verbally beating a confession out of her. After a remittitur by the trial court, accepted by Respondent, the ratio of compensatory to punitive damages was still a reasonable ratio of one-to-two ($59,400:$125,000). Furthermore, there were other witnesses (e.g., Debra Troppman) who

testified that Buckley had handled their polygraph examinations in a similarly callous manner, as well as additional evidence that the thefts in question were committed by others who had ultimately paid restitution.

II. STATEMENT OF FACTS

A. Plaintiff's Employer's Use of Polygraph Examination During the Investigation of Internal Theft at its Northglenn Store.

In their Brief, Petitioners significantly misstate the results of the scoring of Tammie Ellis' polygraph examination. Petitioners state that David Buckley reported merely that there were "significant emotional responses indicative of deception" when Tammie Ellis was asked questions about stealing merchandise and money from Fashion Bar. Buckley, in fact, reported that Tammie lied in her responses to those questions, stating in his report that:

> It is the opinion of the examiner, based on this subject's polygraph records, that she is not telling the truth on [these] questions. (Emphasis Added.) (Vol.X,Ex.1 and 1a; Tr.Vol.IV,p.590.)

In contrast, each expert called by both parties at trial testified that their scoring of Tammie Ellis' polygraph charts was inconclusive, meaning that there was no clear indication of either truth or deception (Tr.Vol.II,pp.281-285;Vol.III,p.318;Vol.IV,p. 630;Vol.V,p.738).

This testimony was extremely significant, since it was Plaintiff's employer's policy to treat "inconclusive results" as a "pass". A failure, on the other hand, resulted in immediate termination.

B. Background of Tammie Ellis.

Tammie Ellis grew up in Denver and graduated from Temple Baptist High School in Denver in 1981. During her upbringing and in recent years, much of her life has revolved

around church activities. She normally attends church services and activities three or four times per week, and currently attends Tri-Town Baptist Church (Tr.Vol.I,pp.90-93).

Tammie Ellis began working in 1981, immediately after graduating from high school. Her first job was as a cashier and cook at a K-Mart cafeteria. After her marriage in 1982, she took a job as a collator and secretary for Allied Computer in Littleton, Colorado. The job lasted approximately one year, until the company shut down. (Tr.Vol.I,pp.90-95).

At the time she applied for a job at Fashion Bar in May, 1983, Tammie Ellis was 20 years old. She had, for two years, held jobs requiring her to handle or have access to substantial amounts of money. Her reputation for honesty and truthfulness, which was extremely important to her, had never been in doubt. (Tr.Vol.I,pp.90-97).

According to Bob Ellis, Tammie's husband, Tammie's reputation was "the most important

thing to her in the world." Robert Rourk, pastor of Tri-Town Baptist Church, testified that Tammie was one of the most honest people he had ever met and that she was "very concerned" about her reputation for honesty and integrity (Tr.Vol.II,pp.180-189).

Almost immediately after she began working as a cashier at Fashion Bar, Tammie became aware that cash shortages at Fashion Bar were "an ongoing problem". The shortages continued throughout the next year. Approximately eight months after she began working at the store, Tammie was informed by store personnel that she and other employees would have to take a polygraph examination. She knew that cooperating with the store in taking the polygraph was a condition of her continued employment with Fashion Bar and she agreed to take the test without hesitation. (Tr.Vol.I, pp.99-101).

C. Examination by David Buckley.

The polygraph examination of Tammie Ellis was performed on February 2, 1984. Tammie arrived at the offices of John Reid and Associates at approximately 2:30 p.m. The examination began 15 minutes later (Tr.Vol.I,pp.102-103).

The examination room was small. Only Tammie and David Buckley were present. Before Tammie was "hooked up" to the polygraph machine she informed Buckley verbally she might be pregnant (as it turned out she was, even though she had checked "no" on his questionnaire.) Buckley then asked her whether she had ever stolen anything in her life. Her response was that the only thing she had ever stolen in her life was a piece of gum. Buckley, apparently not believing the response to this initial question, told Tammie that "nobody's that honest" and repeatedly questioned her on what else she had stolen in her lifetime. She repeatedly denied that she

had ever stolen anything except a piece of bubble gum. In Tammie's view, Buckley "didn't believe me from the start" (Tr.Vol.II,pp.104-126.)

The polygraph test lasted 15-20 minutes. After the polygraph test was concluded, Buckley informed Tammie that she had failed the test. He then began his interrogation of her (Tr.Vol.I,pp.107-109).

David Buckley's interrogation of Tammie Ellis lasted two to three hours (Tr.Vol.I,pp. 112-113; Vol.IV,p.593). Buckley did most of the talking, not allowing Tammie any significant time to respond (Tr.Vol.I,p.112).

To Tammie, it appeared that David Buckley had made up his mind about her. He refused to believe anything she was saying. He was excited, and was "short and sharp" with her. He "wanted a confession from me that I couldn't give." (Tr.Vol.II,P.126).

As the hours went by, Buckley continued to press Tammie on what she might have "stolen"

from Fashion Bar that could have caused the negative responses on the polygraph test. Tammie told Buckley she exchanged wheat pennies from the cash register with pennies of her own. Buckley accused her of stealing them, which Tammie denied. (Tr.Vol.I,p.111).

Tammie also told Buckley that she had, with the permission of her manager, deferred paying ten cents for a bag of potato chips from the Fashion Bar employees' break room. She later repaid the ten cents and didn't regard the incident as "stealing" (Tr.Vol.I,p.112).

As the interrogation dragged on, Tammie began to cry. She felt that despite her honesty with Buckley, he clearly did not believe her. Rather, he persisted in accusing her of stealing from her employer (Tr.Vol.II,p.127). Buckley noted on his charts that he felt Tammie's tears were "phony and inappropriate." (Tr.Vol.III,p.363).

The interrogation finally ended after 6:00 p.m., over an hour after the offices of John

Reid and Associates had closed (Tr.Vol.I,p. 114). According to Tammie, Buckley stopped his questioning only after somebody came to the examination room and told Buckley that it was after 6:00 p.m. and that Tammie had to leave. Bob Ellis, Tammie's husband, had been waiting for Tammie. After the receptionist left at 5:00, Bob tried the door to the examination room and found it locked. After 6:00 p.m., he finally saw someone in the back room and asked him to check to see if the examination was over (Tr.Vol.I,p.114;Vol.II,p.178).

At no time did David Buckley advise Tammie that she could leave the room, and she did not feel that she was free to leave the room as long as Buckley was talking to her (Tr.Vol.I, pp.108-113).

At trial, David Buckley testified that he might well have continued his interrogation of Tammie had she stayed longer. At the time Tammie left the examination room, crying,

Buckley told her that he thought the longer she sat in the room with him, the more he could "get out of her" (Tr.Vol.II,p.128; Vol.IV,p.596).

D. David Buckley's Report to Fashion Bar.

Following his polygraph examination of Tammie Ellis, David Buckley made a written report of his findings to Fashion Bar. In his report, Buckley stated that he had asked Tammie whether she had stolen merchandise or money from Fashion Bar, or knew anyone who had. Tammie's answers to each one of these questions was "no" (Tr.Vol.III,p.364). In his conclusion to the report to Fashion Bar, he wrote that, "It is the opinion of the examiner based on the subject's polygraph records that she is not telling the truth" with regard to stealing merchandise or money from Fashion Bar, or knowing someone who had (Tr.Vol. III, p.364).

He also reported she admitted stealing pennies and potato chips (Vol.X, Ex.1 and 1a) which is a blatant misstatement of the facts. (Tr.Vol.III,p.410).

At trial, Buckley acknowledged that he could not tell from the examination whether the reaction he saw on Tammie Ellis' polygraph results were caused by her concerns over the exchange of wheat pennies, her concerns over borrowing ten cents for potato chips, or whether it was related to more important matters. He never stated in the report that Tammie's apparent "deception" was anything less than an indication that she had been stealing significant amounts of money and/or merchandise from Fashion Bar (Tr.Vol.III,p.365).

Buckley contended that he reported orally to Larry Neumayr, director of loss prevention for Fashion Bar, that his conclusions might merely reflect Tammie's concerns over

exchanging wheat pennies, or borrowing ten cents for potato chips (Tr.Vol.III,p.388).

This testimony was directly contradicted by Larry Neumayr, who testified at trial. Mr. Neumayr testified that Buckley told him only that Tammie had failed the test, and that she had admitted "stealing" wheat pennies and potato chips (Tr.Vol.III,p.410). Buckley never told him that Tammie could have "failed" merely because of her concerns about the wheat pennies and potato chips (Tr.Vol.III,p.410). In fact, from the report tendered by David Buckley, Mr Neumayr assumed that there were "serious reasons" why Tammie Ellis didn't pass the test. If, in fact, Tammie had failed the test merely due to her concerns over a bag of potato chips and exchanging wheat pennies, Mr. Neumayr would have met with her and worked out the problem (Tr.Vol.III,pp.468-471).

After the test, Tammie's father, Richard Farmer, called Buckley to ask about a re-test. Buckley informed him that the re-test would

cost $300, more than twice the amount that Fashion Bar had been charged for Tammie's initial examination (Tr.Vol.III,pp.369-370).

E. Emotional Distress and Economic Damage Suffered by Tammie Ellis.

When Tammie Ellis walked out of the examination area, her husband Bob could tell she had been crying. Bob Ellis described his wife as "fractured" following the examination (Tr.Vol.II,pp.179-180). She was scheduled to return to work following the test, but was too upset to do so ("I was upset because I had been accused of something I knew I didn't do, and I just could not work") (Tr.Vol.II,p.128).

When Tammie returned to work the following day, she was treated "like a criminal". She was told to stay away from the cash registers, to stay away from the men's apparel desk, and not to tell anyone what had happened. (Tr.Vol. II,p.130). She was told to give up the Fashion Bar pen she was holding so the pen

wouldn't be taken (Tr.Vol.II,p.129). That afternoon, she was told she was suspended for three days for failing the polygraph test. (Tr.Vol.II,p.131).

After the three day suspension, Tammie again returned to Fashion Bar. At that time, she was fired because of the polygraph results. She was told to gather her belongings and leave immediately (Tr.Vol.II,pp.132-135).

Subsequent to her firing, Tammie requested a copy of the report Fashion Bar had received from Buckley. She received it ten days after her termination and had to pay Buckley $3.00 to get it. After reading the report, Tammie "just felt crushed". In addition to stating that she had lied about stealing merchandise and money from Fashion Bar, the report inaccurately stated that she had admitted "stealing wheat pennies and potato chips". ("I knew I was honest and this letter says I'm not. It just destroyed anything I had that

was important to me...") (Tr.Vol.II,pp.136-138).

For the two weeks following her termination from Fashion Bar, Tammie refused to leave her home. She refused to go anywhere. It took the family two weeks to get her to go out and walk around the block. She was depressed, and, according to her husband, "cooped up in her own little world." She withdrew from family and friends, and was embarrassed to go out in public (Tr.Vol.II,pp.137-140,181-182).

Tammie felt that Buckley's report had reached Fashion Bar managers, who would always regard her as "a liar and a thief." To this day she avoids the Northglenn Mall and will not go near a Fashion Bar. (Tr.Vol.II,p.142).

After receiving the report, Tammie sought counseling from her pastor, Robert Rourk. He recalled her as being "very concerned and pretty shaken up". She was worried not only about a "flaw in her record," but that despite her innocence, "other people would believe

that perhaps she was guilty". Tammie continued to see Pastor Rourk on occasions when she "got depressed and real down". In Pastor Rourk's opinion, Tammie suffered permanent and irreparable emotional damage as a result of the incident ("I assure you that as I know her, that it is something that she is going to suffer for probably the rest of her life to a degree, even if the thing were cleared up...") According to her husband Bob, Tammie "to this day sometimes mentally locks herself up in her room." (Tr.Vol.II,pp.149, 190-193).

Several years after the incident, Buckley's report still affected Tammie's self-confidence and ability to obtain employment. After the birth of her child, Tammie's family had to "push" her into going out to apply for jobs. Tammie felt she had to be honest on job applications and indicate that she had been fired by Fashion Bar (Tr.Vol.II,pp.142-148). As a result, she was unemployed for "about a

year" due to her inability to get a job (Tr.Vol.II,p.147).

Tammie's termination from Fashion Bar caused the Ellis family substantial financial hardship. At the time Tammie was fired, Bob Ellis was in school training to be a police officer. As a result of her termination, he had to quit school and take a job in order to support his family. Bob and Tammie were forced to borrow money from their parents in order to pay their mortgage. They "got behind" on bills and lost their good credit rating. Having lost the medical benefits that were part of her employment at Fashion Bar, Tammie had to pay the costs associated with the birth of her child, which amounted to approximately $3,000 (Tr.Vol.II,pp.143-146).

F. Expert Testimony.

1. Cleve Backster. Plaintiff's expert witness, Cleve Backster has been involved in the polygraph field for 39 years, and has

taught polygraphy to both the CIA and the FBI. He has consulted with numerous governmental agencies that use polygraph, and co-founded the National Training Center of Lie Detection in New York City. He has directed 119 polygraph courses, has been involved in well over 50,000 polygraph cases and is a charter member of the American Polygraph Association (Tr.Vol.II,pp.204-208,234-239).

In Cleve Backster's opinion, David Buckley acted below the standard of care for polygraph examiners in finding that Tammie Ellis lied when she stated she had not stolen any merchandise or money from Fashion Bar. In Mr. Backster's opinion, the charts of Tammie Ellis' polygraph examination were clearly inconclusive, meaning that there was no clear indication one way or the other as to truth or deception (Tr.Vol.II,pp.281-284).

Mr. Backster was familiar with the Reid technique and the Reid checkmark scoring system which differs slightly from the

numerical method that is customarily used in the industry, and which he introduced in 1959. Regardless of whether the Reid checkmark method or numerical scoring was used, however, it was Mr. Backster's opinion that "any competent examiner" reading Tammie Ellis' polygraph charts would conclude that the polygraph results were inconclusive, rather than indicative of deception (Tr.Vol.II, pp.288, 295 and 302).

2. Joseph B. Smith. Joseph Smith, also called to testify on behalf of Tammie Ellis, owns and runs Aurora Polygraph and Consultant Services, Inc. He has performed over 8,000 exams since 1974, both for his business and for the Adams County Sheriff's Department. He is a member and past president of the Colorado Association of Polygraph Examiners (Tr.Vol.II,pp.307-313).

Mr. Smith testified he was familiar with the checkmark scoring system used by David Buckley in his scoring of Tammie Ellis'

polygraph examination. In Mr. Smith's opinion, the charts of Tammie Ellis' polygraph examination were clearly inconclusive, and, as such, it was substandard for David Buckley to report that Tammie Ellis' answers to the questions of whether she stole money or merchandise from Fashion Bar indicated deception (Tr.Vol.II,pp.318-324).

3. David Buckley. Even David Buckley, defendant in this action, equated the checkmark scoring system that he commonly uses, to Backster's numerical system commonly used by the majority of polygraphers and all of the other experts. Buckley testified that both systems are methods of quantitatively analyzing a polygraph chart. Buckley's use of light, medium and heavy checkmarks correlate to the numerical assignments of one, two and three. (Tr.Vol.III,p.506, 512).

Although Buckley denied any improper scoring of Tammie Ellis' polygraph examination, he made several key admissions:

(1) he failed to afford an opportunity to Tammie Ellis for a re-test, as required by standard 6 of the American Polygraph Association Standards and Principles of Practice (Tr.Vol.IVA,pp.8-13); (2) although he denied misreporting the results of his examination of Tammie Ellis, he did state that the American Polygraph Association Code of Ethics provides that it is gross negligence for a member to misreport the results of an exam (Tr.Vol.IVA,p.49).

4. Defendants' Expert Witnesses. Frank Horvath and Lynn Marcy, both polygraphers, were called as defense experts. While both experts generally defended Buckley's scoring of Tammie Ellis' polygraph examination, both scored the examination as "inconclusive," and not as deceptive as Buckley had scored it. (Tr.Vol.IV,pp. 630, 646).

ARGUMENT

REASONS FOR DENYING THE PETITION

I. PETITIONERS HAVE MISSTATED THE EVIDENCE

Petitioners have significantly misstated the evidence at each stage of appeal in this case. In Tacon v. Arizona, 410 U.S. 351 (1973), this Court noted that a Writ of Certiorari will be dismissed as improvident where the only relevant issues raised in state courts were primarily factual issues as they are here.

For example, the Petitioners point out under the heading entitled: "Evidence Pointing to Ellis' Guilt":

> Prior to administering a polygraph examination and interviewing Ellis, Buckley had been told by another Fashion Bar employee that she had seen Ellis take some money from the cash register at Fashion Bar and place it in an envelope containing her personal cancelled checks. The other employee also stated that she saw Ellis place the envelope under her desk, and that she thought Ellis was probably stealing the money...

This is all true except it was not presented at trial. This is most likely because Plaintiff had a 3' x 5' blow-up exhibit of a cancelled check written by Ellis to Fashion Bar which her supervisor had approved for her to cash. The other employee that witnessed this incident was not unavailable at trial as Petitioners indicated. Defendants simply elected not to call her after reviewing Plaintiff's exhibits. This witness had not moved or even changed employers prior to trial, and Plaintiff was ready to call her as a rebuttal witness if necessary.

The facts are that Buckley was convinced of Tammie's guilt prior to the examination and never gave her a chance to explain the fact that she had been seen simply cashing an employer-approved check. Buckley never asked Tammie during the 2 - 3 hour interrogation about the statement! He then used his superior position and the spectra of the

polygraph machine to berate and harass a pregnant, naive and deeply religious girl for 2 -3 hours, not letting her leave until over an hour after his office had closed, and all the while keeping her husband locked out of the interrogation room!

Buckley misread his own graphs according to each and every expert at trial, including his own, and then recklessly cost Plaintiff her job and more importantly her confidence and self-respect. The fact that another Fashion Bar employee, Debra Troppman, testified that Buckley had treated her in a similar manner showed a pattern of intentional misbehavior that deserves to be punished.

II. THIS COURT LACKS JURISDICTION

Defendant-Petitioners incorrectly claim that they have properly asserted jurisdiction under 28 U.S.C. §1251(a). 28 U.S.C. §1251(a) gives the U.S. Supreme Court original and exclusive jurisdiction of all controversies

"between two or more states." Because this case does not involve a controversy between two or more states the Defendant-Petitioners do not have jurisdiction under 28 U.S.C. §1251(a).

Defendant-Petitioners have for the first time raised federal constitutional issues, basing their Petition on Pacific Mutual v. Haslip, 89-1279, cert. granted, 110 S.Ct. 1780, 108 L.Ed.2d 782, 89-1279, 58 Law Week 3625, ruling below 553 S.2d 537 (Ala. 1989). At no time were any of the Federal constitutional issues of Pacific Mutual, supra, which are now being presented by the Petitioner, raised, argued, considered or ruled upon in a Colorado trial or appellate court. Therefore, this Court also lacks jurisdiction under 28 U.S.C. §1257 to consider the Federal constitutional issues so belatedly presented by Petitioners.

28 U.S.C. §1257(3) provides that this Court may grant certiorari where "the validity of a

State statute is drawn in question on the ground of its being repugnant to the constitution..." However, this ground was never argued, considered or ruled upon in the trial court, the Colorado Court of Appeals or the Colorado Supreme Court.[10]

Jurisdiction of the United States Supreme Court to review a judgment of the highest court of a state turns upon whether a Federal right was specifically set up or claimed in that court and denied by its decision. To be effective for this purpose, an assertion of a Federal right must at least have "fair color of support" and not be frivolous or wholly

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[10] No constitutional "due process" issues were raised by Petitioners in the Colorado Court of Appeals or in the Colorado Supreme Court. After the Colorado Supreme Court had denied the Petition for Certiorari, Petitioners filed a subsequent Motion to Reconsider Denial of Petition for Certiorari, which did, for the first time, raise constitutional issues. This Motion to Reconsider, however, was stricken by the Colorado Supreme Court as untimely and not authorized by Colorado Appellate Rules (C.A.R. 54).

without foundation; a Federal question which rests upon an obviously false assumption is so plainly devoid of merit as to afford no basis for exercise by the Federal Supreme Court of its appellate jurisdiction over the state court. Parker v. McLain, 237 U.S. 469 (1915).

The general rule is that questions, of whatever nature, not raised and properly preserved for review in the trial court, will not be noticed on appeal to the United States Supreme Court. Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc., 360 U.S. 334, (1959); Dick v. New York Life Ins. Co., 359 U.S. 437, (1959).

The United States Supreme Court does not have jurisdiction to consider or entertain particular questions or matters not raised at a state court level, as with respect to relief, causes of action or grounds for recovery, grounds of defense or opposition, or constitutional questions. Hull v. Burr, 234 U.S. 712, (1914); Weade v. Dichmann, Wright

and Pugh, 337 U.S. 801, (1949); United Rys & Electric Co. of Baltimore v. West, 280 U.S. 234, (1930); Shelley v. Kraemer, 334 U.S. 1, (1948).

The United States Supreme Court will not ordinarily decide questions of local law independently, but will look to the trial court for aid in dealing with issues of state law that enter into judgments. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950); U.S. v. Durham Lumber Co., 363 U.S. 522 (1960). The United States Supreme Court usually accepts and will not disturb the determination of the state appellate court on such questions in the absence of plain error. Allegheny County v. Frank Mashuda Co., 360 U.S. 185 (1959); Spiegel's Estate v. C.I.R., 335 U.S. 701 (1949); U.S. v. Kimball Foods, Inc., 440 U.S. 715 (1979); New Haven Inclusion Cases, 399 U.S. 392 (1970). Fact findings of the trial court are given great weight and will be accepted by the Supreme Court unless

clearly erroneous. Comstock v. Group of Institutional Investors, 335 U.S. 211 (1948); Mayor of City of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974).

A party cannot assume an attitude inconsistent with or different from that taken by him at the trial level when a cause is brought up for review to the Supreme Court. Texas & P.R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, (1907). Petitioner is restricted to the theory on which the cause was defended in the state court. Weade v. Dichmann, Wright and Pugh, supra. The Petitioners cannot change their theory or position as to the nature of the cause of action or their defense. San Juan Light & Transit Co. v. Requena, 224 U.S. 89, (1912); Thomas v. Taylor, 224 U.S. 73, (1912).

Explicit and timely insistence in state court that a state statute is repugnant to the Federal Constitution, treatises or laws, is a requisite to jurisdiction of the United States

Supreme Court (under 28 U.S.C. §1257) to review, on appeal, judgment of a State Court upholding the statute. Rohr Aircraft Corp. v. County of San Diego, 362 U.S. 628 (1960).

Jurisdiction of the Supreme Court does not depend on whether the state court addressed a federal question; it is enough that the federal claim was made and not accepted; but the Supreme Court would not have jurisdiction under §1257 if the federal question was neither raised nor decided in the state proceedings. Lynk v. LaPorte Superior Court No.2, 789 F.2d 554 (CA 7 Ind 1986). [Emphasis added].

Rule 10 of the United States Supreme Court Rules provides that review on writ of certiorari is not a matter of right, but of judicial discretion and will be granted "only when there are special and important reasons therefore." The following, while neither controlling nor fully measuring the Court's discretion, indicates the character of reasons

that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter, or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings...

(b) When a state court of last resort has decided a federal question...

(c) When a state court ... has decided an important question of federal law which has not been, but should be decided by this Court..."

Viewing the facts, evidence and law of this case as set forth in the decisions of the trial court, Colorado Court of Appeals and denial of certiorari by the Colorado Supreme Court (as attached to Petitioners brief as Appendices) it is apparent that no federal

question was ever raised, argued, considered or ruled upon.

In this case the validity of Colorado's Punitive Damage Statute, C.R.S. §13-21-102, was never challenged and therefore this Court lacks jurisdiction or should at least deny discretionary review under 28 U.S.C. §1257.

In this case, Petitioners have simply copied the issues in Pacific Mutual v. Haslip, supra, even though the entire factual and statutory background is completely different, both in posture and in the underlying substantive state law being appealed. This is not enough. The federal question necessary to appellate jurisdiction in the United States Supreme Court must be one not in mere form, but in substance. Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co., 252 U.S. 388 (1920).

III. DEFENDANT-PETITIONERS HAVE MISSTATED THE FACTS, EVIDENCE AND LAW OF THIS CASE TO CONFORM THEM TO ANOTHER CASE PRESENTLY BEFORE THIS COURT UNDER VERY DIFFERENT FACTS.

Pacific Mutual Life Insurance Company v. Haslip, supra, deals with a situation where Alabama provided no statutory guidelines or standards for a jury to use in awarding punitive damages. They were entirely discretionary in Alabama at the time of the acts that gave rise to Pacific Mutual. There has always been a controlling statute in Colorado setting forth adequate guidelines for the assessment of punitive damages as well as considerable case law further defending the jury's role in assessing punitive damages.

The United States Supreme Court in Pacific Mutual, supra is also considering the issue of whether or not an award of punitive damages when applied against a corporate defendant for the unauthorized acts of its agent violates the corporation's right to due process. This is not the issue presented here. In this case, Defendants stipulated to their employee's agency and stipulated to the application of respondeat superior. Also, the

underlying facts in Pacific Mutual, supra are much different. There, the corporate defendant presented its case by claiming that the agent was outside the scope of his agency at the time he committed the acts which gave rise to the punitive damage award. Defendants cannot now claim that even though they stipulated to David Buckley's agency and the application of respondeat superior, that they should be protected against an award of punitive damages for his individual acts.

IV. EVEN ASSUMING ARGUENDO THAT A PROPER ISSUE UNDER FEDERAL LAW EXISTS, THE STANDARDS FOR THE IMPOSITION OF EXEMPLARY DAMAGES UNDER COLORADO STATUTES, JURY INSTRUCTIONS AND CASE LAW ARE CONSISTENT WITH THE DUE PROCESS CLAUSE AND THE HOLDINGS OF THIS COURT. THE CASES CITED BY PETITIONER ARE WHOLLY DISTINGUISHABLE AND NOT CONTROLLING. THE EXEMPLARY DAMAGES AWARDED BY THE JURY IN THE PRESENT CASE ARE NOT GROSSLY EXCESSIVE, ARE CLEARLY REASONABLE, AND ARE IN AN APPROPRIATE RATIO TO THE COMPENSATORY DAMAGES ALSO AWARDED BY THE JURY.

At the time this case arose, a Colorado statute, C.R.S. §13-21-102 (1973), provided:

> Exemplary Damages. In all civil actions in which damages are assessed by a jury for a wrong done to a person, or to personnel or real property, and the injury is attended by circumstances of fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages under this statute.

In light of this statute, Colorado courts instructed juries, as in the present case, consistent with Colorado Jury Instructions - Civ. 2d 5:3 (1980) that:

> If you find in favor of the plaintiff, and award actual damages, then you should consider whether the plaintiff is entitled to exemplary damages. If you also find <u>beyond a reasonable doubt</u> that the injury complained of was attended by circumstances of insult or a wanton or reckless disregard of the rights and feelings of the plaintiff, then in addition to any actual damages, you may also award the plaintiff a <u>reasonable</u> sum as exemplary damages. Exemplary damages are not to be construed as compensation to the plaintiff for wrong done, but as punishment to the defendant, and as an example to others. [Emphasis added.]

A jury finding of punitive damages in Colorado is supported if the evidence is sufficient to support a determination "beyond a reasonable doubt" that defendant acted with a wanton and reckless disregard of the rights of plaintiff. Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 408 F.Supp. 1219 (D.Colo. 1976), modified on other grounds and aff'd, 561 F.2d 1365 (10th Cir. 1977), cert. dismissed, 434 U.S. 1052 (1978).

Although exemplary damages are not automatic, they are designed to inhibit or deter the type of conduct for which they are awarded, and are assessed in addition to actual damages even though they can both arise from the same conduct. Beebe v. Pierce, 185 Colo. 34, 521 P.2d 1263 (1974); Enright v. Graves, 560 P.2d 851 (Colo. 1977). They are not double punishment. E.F. Hutton & Co. v. Anderson, 42 Colo. App. 497, 596 P.2d 413 (1979).

The purpose of exemplary damages is not to compensate the plaintiff, as is the purpose of damages for outrageous conduct, but rather to punish the defendant. Leidhold v. District Court, 619 P.2d 768 (Colo. 1980); Mince v. Butters, 200 Colo. 501, 616 P.2d 127 (1980).

The amount of a punitive damage award is within the discretion of the jury and need not be strictly proportionate to the amount of compensatory damages so long as the record shows that the jury was properly guided by the criteria for assessing punitive damages. Walford v. Blinder, Robinson and Co., Inc., 793 P.2d 620 (Colo. App. 1990); Palmer v. A. H. Robbins Co., Inc., 684 P.2d 187 (Colo. 1984); and Coale v. Dow Chemical Co., 701 P.2d 885 (Colo. App. 1985), but see §13-21-102(1)(a) C.R.S. (1987 Repl.Vol.6A) (limiting exemplary damages in causes of action arising after July 1, 1986).

The guiding criteria for assessing an award for punitive damages are: "(1) The nature of

the act which caused the injury; (2) the economic status of the defendant; and (3) the deterrent effect of the award on others." Walford v. Blinder, Robinson & Co., Inc., supra; Palmer v. A. H. Robbins Co., supra.

The fact that in the present case the jury's ratio between compensatory damages ($122,000.00) and punitive damages ($125,000.00) was very nearly a one-to-one ratio, and that after remittitur they remain at approximately one-to-two ($59,400:$125,000), indicates that the relationship between compensatory and punitive damages is reasonable. See, Frick v. Abell, 602 P.2d 852 (1979) (1:3 ratio upheld); Palmer v. A. H. Robbins Co., Inc., supra (10:1 ratio upheld); and Mailloux v. Bradley, 643 P.2d 797 (Colo. App. 1982) (10:1 ratio and 35:1 ratio upheld).

Obviously, Colorado law provided much more than no standards for awarding punitive damages, as Defendant-Petitioners allege and

as this Court is considering in Pacific Mutual v. Haslip, supra.

Colorado courts and Federal courts have also held that C.R.S. §13-21-102 (1973) did not constitute double punishment, did not violate equal protection, was not void for vagueness, was not or cruel and unusual punishment, and was intended to authorize an award of exemplary damages for the purpose of punishing persons who have inflicted injuries with malice. E.F. Hutton & Co. v. Anderson, supra; Palmer v. A.H. Robbins Co., Inc., supra; Wegner v. Rodeo Cowboy's Ass'n, 290 F.Supp. 369 (D.Colo. 1968) aff'd and rehearing denied, 417 F.2d 881 (10th Cir. 1969), cert. denied, 398 U.S. 903 (1970).

As above stated, the purpose of exemplary or punitive damages is to protect the health, property, economic and civil rights of citizens not only by compensating those whose rights are invaded, but also by punishing and deterring similar future gross misconduct.

This is the very basis of the "fault" principle in tort law. Punitive damages merely increase the severity of the warning function of compensatory damages.

Furthermore, compensatory damages alone are not adequate to achieve this goal, particularly where the misconduct is intentional or willful as it was in this case. Actual damages have no relation to the reprehensibility of misconduct. Nor do compensatory damages effectively deter violations of constitutional rights which though valuable, do not entail great monetary consequences. Carlson v. Green, 446 U.S. 14, 22 n.9 (1980) (in such cases, "punitive damages may be the only significant remedy.")

Respondent recognizes that some members of this Court have expressed concern about the clarity of the legal standards used to limit the size of punitive damage awards in civil cases. Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. ____, 109 S.Ct. 2909,

2923-24, 106 L.Ed. 2d 219 (1989). Undoubtedly the laws of some states have specific flaws that are of sufficient importance nationally to justify the exercise of jurisdiction by this Court. But the law of Colorado, as applied to this case concerning the award of punitive damages, is reasonably calculated to produce fair outcomes. The law of Colorado presumes the basic right to trial by jury in tort cases, but at the same time recognizes that lay persons on the jury need some guidance to decide whether to award punitive damages in the first place and, if so, in what amount. The jury's decision is not final. If it reaches a verdict that is demonstrably excessive, both the trial and appellate courts have ample authority to set aside unlawful and unjust punitive damage awards, or to order an appropriate reduction.

Within this framework, the Petitioners did not fare as well as they would have wished. But the Petitioners' distaste for the outcome

below does not readily transform this case into an example of the evil of a runaway jury eager to climb into the pocket of a wealthy, but hapless defendant. This Petition for Certiorari represents the last hope of the Petitioners in their quest to avoid liability for their involvement in Tammie Ellis' tragedy, a journey that began some six years ago. At this juncture, the case is truly a dispute between the parties without any national or constitutional import.

V. THE AWARD OF BOTH EXEMPLARY OR PUNITIVE DAMAGES (TO PUNISH THE WRONGDOER AND SET AN EXAMPLE) AND DAMAGES FOR OUTRAGEOUS CONDUCT (COMPENSATORY DAMAGES FOR INJURIES CAUSED BY INTENTIONAL OR RECKLESS INFLICTION OF EMOTIONAL DISTRESS) IS IN NO SENSE A "DOUBLING UP", DOES NOT VIOLATE DUE PROCESS OR EQUAL PROTECTION, AND DOES NOT EVEN RAISE A CONSTITUTIONAL QUESTION.

Under Colorado law, outrageous conduct and punitive damages have long been held to be distinct and separate awards. See: Specht v. Jensen, 832 F.2d 1516 (10th Cir. 1987); Montgomery Wards Co., Inc. v. Andrews, 736

P.2d 40 (Colo. App. 1987); Meiter v. Cavanaugh, 580 P.2d 399 (Colo. 1978); DeCicco v. Trinidad Area Association, 573 P.2d 559 (Colo. App. 1977); Wegner v. Rodeo Cowboy Ass'n., supra; Enright v. Graves, supra. As stated in Restatement (Second) of Torts, §46 (1965), adopted by the Colorado Supreme Court in Rugg v. McCarty, 173 Colo. 170, 476 P.2d 753 (1970), compensatory damages may be assessed on one who, by extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress to another subjecting him to liability for such emotional distress.

Petitioners cite Knierim v. Izzo, 22 Ill.2d 73, 174 N.E. 2d 157 (1961), as support for their argument that damages for outrageous conduct and punitive damages are duplicative and somehow constitute a constitutional violation.

Knierim, supra, involved claims for murder, wrongful death, and outrageous conduct and "no

limit was placed on the amount of compensatory damages, so it was reasonable to assume the same amount would properly punish the wrongdoers." footnote 7. UNR Industries, Inc. v. Continental Ins. Co., 607 F.Supp. 855 (D.C.Ill. 1984). Knierim, supra, is a limited aberration of the law even in Illinois, where courts do allow both outrageous conduct and punitive damage awards. See, Gilardi v. Schroeder, 672 F.Supp. 1043 (N.D. Ill. 1986).

Other jurisdictions have flatly refused to adopt Knierim, supra and its limited progeny, dismissing them summarily as without merit. Fletcher v. Western National Life Insurance Co., 89 Cal. Rptr. 78 at 95 (C.A. 4th Dist. 1970); See also, State Rubbish Etc. Ass'n v. Silizmoff, 38 Cal. 2d 330, 240 P.2d 282 (1952). Knierim, supra is cited most often as simply the first case in Illinois to recognize outrageous conduct.

The 10th Circuit addressed the issue of duplication in Malandris v. Merrill Lynch,

Pierce, Fenner & Smith, 703 F.2d 1152 (1981) at 1171, footnote 7, saying, "[I]t is clear under Colorado law both compensatory and punitive damages may be awarded...", citing Enright v. Graves, supra. Implicitly the 10th Circuit also held that such an award of both punitive damages and damages for outrageous conduct did not violate due process.

VI. ALL VIABLE ISSUES ARE MOOT AS A MATTER OF LAW

There are no viable issues to be considered on appeal since Colorado has amended Colorado statute C.R.S. §13-21-102 in 1986 to provide an even more detailed statute regarding punitive damages, and the Federal government has preempted the area of civil law addressed in this action by passing the Employee Polygraph Protection Act of 1988, 29 U.S.C. §2001, et. seq.

Rule 10 of the Supreme Court Rules requires special and important reasons to review

decisions of lower courts. No such reasons are presented here. To the contrary, Defendant-Petitioners' claims raise only misplaced and moot questions. An appeal from a judgment of the highest court of a state will be dismissed by the United States Supreme Court where resolution of the constitutional issues presented by an appellant is not appropriate in the circumstances of the case. De Backer v. Brainard, 396 U.S. 28 (1969). A federal question sufficient for consideration by the Supreme Court must not be merely abstract or moot. Little v. Bowers, 134 U.S. 547 (1890); Kimball v. Kimball, 174 U.S. 158 (1899). The concern of the Supreme Court is to see that substantial justice is done, not to search the record for possible errors. Williams v. U.S., 341 U.S. 97, (1951). Any matter involved in the case on review in the Supreme Court which has become an abstract or moot question will not be reviewed. First National Bank of Arizona v. Cities Service

Co., 391 U.S. 253 (1968), rehearing denied, 393 U.S. 901 (1968).

CONCLUSION

In every person's life, whether such a person lives to be twenty or one hundred years old, there are certain days that remain etched in memory forever--the day a loved one dies, the day of the birth of a first child, and so forth. Such a day is that on which Tammie Ellis was mercilessly interrogated by Defendant Buckley and subsequently incorrectly reported as being deceptive on a polygraph test and implicitly guilty of theft. She lost not only her job, but more importantly, she lost what little confidence she had at her young age and just about all of her self-esteem. In this regard, the trial court judge had no problem finding that the conduct on the part of Petitioners should be submitted to the jury's determination of whether it constituted "outrageous conduct", entitling her to

compensatory damages, or circumstances of "fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings", entitling her to punitive or exemplary damages:

> "Now, this is evidence taken in the light most favorable to the Plaintiff. By that standard, I have no trouble with my duty as a judge of this Court to say that that would fit within the extreme and outrageous conduct. Again, I am not adopting any conclusion of fact, but given the evidence of record, the weight that is most favorable to the Plaintiff, that's what's there." Tr.Vol.III, p. 440.

Colorado was not a state with no standards governing the imposition by a jury of punitive or exemplary damages at the time this case arose and was tried. As discussed below, guidelines were provided not only by statute, but also by detailed jury instructions; by the trial court in deciding whether the issues of outrageous conduct and punitive damages should be submitted to the jury in the first place,

and subsequent to the trial in ordering a remittitur; and by the Colorado appellate courts in applying standards developed in the Colorado case law. The entire process shows a sensitivity by the State of Colorado to the need for guidelines in cases involving facts which give rise to claims for punitive or exemplary damages or outrageous conduct. The resulting verdict, as affirmed by the Colorado Court of Appeals and the Colorado Supreme Court, is reasonable, not excessive, and in no way violates due process.

Finally, and perhaps most importantly, it is respectfully submitted that this Court totally lacks jurisdiction under 28 U.S.C. §1257, and for this reason alone the Petition for Certiorari should be denied. Petitioners never raised any constitutional or due process issues in the Colorado trial court, the Colorado Court of Appeals, or in their Petition for Certiorari to the Colorado Supreme Court. It is totally improper and

disingenuous for these issues to be raised for the first time in the United States Supreme Court. Nor is this a case where the issues have been framed in such a manner that their determination could provide some beneficial guidelines to other states struggling to "fine tune" their handling of claims for punitive damages.

This case began in early 1984. Tammie Ellis has been enduring this "living nightmare" for over six years. It is time for this tragedy to now come to an end, and this Court should deny the Petition for Certiorari for all the reasons above stated.

Respectfully submitted,

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No. 90-191

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DAVID M. BUCKLEY and
JOHN E. REID AND ASSOCIATES, INC.,
an Illinois corporation,

Petitioners,

vs.

TAMMIE R. ELLIS,

Respondent.

On Petition For Writ Of Certiorari To
The Colorado Court Of Appeals

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

		Page
I.	The Petitioners have not misstated the evidence, as claimed by the Respondent, regarding what Buckley had been told by another Fashion Bar employee, namely, that Ellis had taken money from the cash register and placed it in an envelope containing her personal cancelled checks.....	1
II.	This Court does not lack jurisdiction, as claimed by the Respondent.....	4
III.	The Petitioners have not misstated the facts, evidence, and law, as claimed by the Respondent, with respect to how this case relates to Pacific Mutual Life Insurance Company v. Haslip (No. 89-1279), which is scheduled for argument before this Court on October 3, 1990.....	8
IV.	Contrary to the Respondent's assertions, the standards for the imposition of punitive damages in Colorado are not consistent with due process.....	9

Page

V. Damages for outrageous conduct are not compensatory, as contended by Respondent, and when awarded in addition to punitive damages, result in double punishment and violate due process..... 12

VI. The issues presented by the Petition for a Writ of Certiorari are not moot..... 14

TABLE OF AUTHORITIES

Page

Cases

Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc. 492 U.S. ____, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989).. 6

Coale v. Dow Chemical Co., 701 P.2d 885 (Colo. App. 1985)..... 12

Pacific Mutual Life Insurance Company v. Cleopatra Haslip, 553 So.2d 537 (1989), cert. granted April 2, 1990, (No. 89-1279)..... 9

Palmer v. A. H. Robbins Co., 684 P.2d 187 (Colo. 1984)... 12

Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 483, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988)..... 7

Vogel v. Carolina International, Inc., 711 P.2d 708 (Colo. App. 1985)..... 13

United States Statutes

28 U.S.C. Sec. 1257(a) 4
29 U.S.C. Sec. 2001, et seq..... 14, 15, 16

Page

Colorado Statutes

Colo. Rev. Stat.
Sec. 13-21-102 (amended). 16, 17

IN THE
SUPREME COURT OF THE UNITED STATES
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Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COLORADO COURT OF APPEALS

REPLY BRIEF ON PETITION FOR CERTIORARI TO THE COLORADO COURT OF APPEALS

The Respondent has given six reasons why this Court should not grant certiorari in this case. None of them is persuasive. The Petitioners' response is as follows:

I

The Petitioners have not misstated the evidence, as claimed by the Respondent, regarding what Buckley had been told by another Fashion Bar employee, namely, that Ellis had taken money from the cash register and placed it in an envelope containing her personal cancelled checks.

As stated on pages 9 and 10 of the Petition for Writ of Certiorari, the court "whited out" Ellis' name on the copy of Buckley's report to Fashion Bar which went to the jury, so that the jury would not know that Ellis was the person accused. This was done in response to a hearsay objection made by the Respondent's attorney. However, so it would be available

on appeal, the trial court placed a copy of the report, without deletions, in a sealed envelope as Exhibit F and made it a part of the record (Tr. Vol. 4 p. 592 and Vol. X, Ex. F).

The pertinent portion of Exhibit F reads as follows:

> Prior to this subject's polygraph examination, she stated that she saw Tammie Ellis take some money from the cash register at Fashion Bar and place it in an envelope containing her personal cancelled checks. The subject also stated that she then saw Ms. Ellis place the envelope under her desk. The subject stated that she thought Ms. Ellis was probably stealing the money because it is not normal procedure for cashiers to remove money from the register in that fashion.

The Petitioners did not offer the report to prove the truth of the accusation made by the other Fashion Bar employee. The issue was not whether the accusation was true or false, but whether, having been made, it gave Buckley reason along with the polygraph test

results to question the Plaintiff as he did during the post-test interview. The accusation bears upon Buckley's state of mind when questioning the Plaintiff and, on that basis, should be considered as an exception to the hearsay rule.

The Respondent claims that the other Fashion Bar employee was available and that the Respondent was ready to call her as a rebuttal witness, if necessary, and the Respondent was prepared to show that her supervisor had approved of her cashing a personal check. If this is true, it is being disclosed for the first time now. It was not revealed at the time of trial and the Respondent cites no reference thereto in the Record. The Petitioners could not locate the other Fashion Bar employee who made the accusation. Otherwise, they would

have called her as a witness at the trial and avoided the hearsay objection.

Also, the Respondent claims that there was evidence that the thefts in question were committed by others who had ultimately made restitution. The Respondent cites no reference thereto in the Record and, insofar as Petitioners are aware, it is an incorrect statement.

II

This Court does not lack jurisdiction, as claimed by the Respondent. The Petition contains a typographical error in stating that jurisdiction of this Court is invoked under 28 U.S.C. Section 1251(a). It should have read 28 U.S.C. Section 1257(a) and Petitioners request that it be corrected accordingly. Section 1257(a) provides that:

> Final judgments or decreees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by

> writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The Respondent contends that jurisdiction of this Court depends on whether a federal constitutional question was set up or claimed in the state court, and that the "due process" issue was not raised by Petitioners until they filed their Petition for Reconsideration on Denial of the Petition for Certiorari in the Colorado Supreme Court.

However, 28 U.S.C. Section 1257(a) does not expressly require that the federal constitutional question be set up or claimed in the proceedings below and Petitioners submit that this Court

has jurisdiction if the federal constitutional question is set up or claimed in the Petition for Writ of Certiorari timely filed in this Court.

In Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc., 492 U.S. ___, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989), this Court declined to consider a due process challenge to punitive damages which was not set up or claimed in the Petition for Writ of Certiorari filed in this Court, but was raised for the first time in the briefs filed in this Court after certiorari had been granted on a different question, namely, whether punitive damages violated the Excessive Fines Clause in the Eighth Amendment. Such is not the case here. The Petitioners set up and claimed the due process challenge to punitive damages not only in their Petition for Writ

of Certiorari filed in this Court, but also in their Petition for Reconsideration on Denial of the Petition for Certiorari to the Colorado Supreme Court. Moreover, the events in this case closely parallel those in Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 483, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), where this Court granted certiorari and reversed a decision of the Oklahoma Court of Appeals on the constitutionality of the non-claim clause in the Oklahoma Probate Code. There, the due process challenge was not raised until the petitioner sought rehearing in the Oklahoma Court of Appeals as shown by the following passage in this Court's opinion:

> The District Court's reading of §594's relationship to the nonclaim statute was affirmed by the Oklahoma Court of Appeals. Id., at 7. Appellant then sought rehearing, arguing for the first time that the nonclaim statute's notice provisions violated due process. In a supplemental opinion on rehearing the Court of Appeals

> rejected the due process claim on the merits. Id., at 15.

Further, the Petitioner challenged punitive damages in this case for excessiveness and duplication of the damages awarded for outrageous conduct in both the trial court and Colorado Court of Appeals. See, Trial Court's Rulings Regarding Defendant's Motions for Post Trial Relief -- Rule 59 C.R.C.P. (Appendix A 7-9) and dissenting opinion in Colorado Court of Appeals Decision (Appendix B 13-17). It should not be necessary to use the words "due process" where, in fact, the challenge was based upon a lack of fundamental fairness which is implicit in every due process claim.

Petitioners submit that this Court has jurisdiction to grant certiorari in this case.

III

The Petitioners have not misstated the facts, evidence and law, as claimed

by the Respondent, with respect to how this case relates to Pacific Mutual Life Insurance Company v. Haslip (No. 89-1279), which is scheduled for argument before this Court on October 3, 1990. In their Petition for Writ of Certiorari, the Petitioners stated on pages 21, 45 and 46 that this Court has before it Pacific Mutual, wherein it will shortly decide whether the procedures used in civil punitive damage cases violate due process; that certain of the issues in Pacific Mutual are also found in this case; and that Pacific Mutual does not involve a claim for outrageous conduct and does not contain a question regarding double punishment by awarding punitive damages in outrageous conduct cases. Those statements are entirely correct.

IV

Contrary to the Respondent's assertions, the standards for the imposition

of punitive damages in Colorado are not consistent with due process. As pointed out on page 25 of the Petition for Writ of Certiorari, the Colorado punitive damage statute, as it existed at the time this action arose, violated due process because it allowed juries to award punitive damages in any amount they deemed reasonable for conduct which was no more offensive than insulting. The decision as to whether or not to award punitive damages and the amount thereof was left to the moral discretion of the jury. Also, as was noted on pages 26 to 28 of the Petition for Writ of Certiorari, the Colorado legislature later amended the Colorado punitive damage statute to adopt certain standards to guide jurors and courts. However, the amended punitive damage statute is still deficient, because it fails

to guide the jurors as to the circumstances in which fraud, malice or willful and wanton conduct should be punished and fix a definite upper limit therefor, such as a maximum fine in a criminal case. Also, it fails to provide for a bifurcated trial. In this case, both the trial court and Colorado Court of Appeals used subjective value judgments as standards in reviewing the $125,000 punitive damage award. The standard applied by the trial court was whether the outrageous damage award and punitive damage award was (a) grossly and manifestly unjust or excessive, or (b) the result of bias, prejudice or passion. The standard applied by the majority on the Colorado Court of Appeals was whether the punitive damage award was completely unsupported by the record. Neither of these was a meaningful standard which comported with due process.

In Palmer v. A. H. Robbins Co., 684 P.2d 187 (Colo. 1984), the Colorado Supreme Court upheld a punitive damage award of $6,200,000, and in Coale v. Dow Chemical co., 701 P.2d 885 (Colo. App. 1985), the Colorado Court of Appeals affirmed $800,000 in punitive damages against one defendant and $200,000 in punitive damages against another defendant. Colorado courts have consistently displayed great reluctance to reverse or reduce large punitive damage awards and have no meaningful standards for reviewing such awards.

V

Damages for outrageous conduct are to punish the wrongdoer and set an example. They are not compensatory, as contended by the Respondent, and when awarded in addition to punitive damages, result in double punishment and violate due process.

The Respondent suffered an extremely nominal injury, i.e., a few minutes of tears and an evening of being upset, and only took an aspirin or two for headaches. For this, the jury awarded her $48,000 in damages for outrageous conduct. No reasonable person could say that $48,000 was compensatory. In reality, it was punishment for what the jury perceived to be wrongdoing on the part of the Petitioners. But that was not enough punishment. The jury then doubled up the punishment by awarding the Respondent an additional $125,000 for punitive damages.

The Colorado courts have recognized that damages for outrageous conduct and punitive damages are both intended for punishment. In Vogel v. Carolina International, Inc., 711 P.2d 708 (Colo. App. 1985), the Court stated:

> We do not dispute the fact that both exemplary damages and damages for outrageous conduct are directed toward deterrence and punishment of wrongful conduct. See Palmer v. A. H. Robbins Co., supra; Danyew v. Phelps, 676 P.2d 707 (Colo. App. 1983).

Juries in Colorado and elsewhere should not be permitted to continue the practice of punishing hapless defendants twice for the same offense. Such a practice is fundamentally unfair and lacking in due process.

VI

The issues presented by the Petition for a Writ of Certiorari are not moot.

The Respondent contends that the Federal Government has preempted the area of civil law addressed to this action by passing the Employee Polygraph Protection Act of 1988, 29 U.S.C. §2001, et seq. This is not true. The Act expressly provides that it does not preempt any state or local law which

is more restrictive (Section 2009). In addition, the Act specifically allows private sector employers, such as Fashion Bar, to use polygraph tests in ongoing investigations of economic loss, such as theft, embezzlement and misappropriation, where the employee had access to the property that is the subject of the investigation and the employer has reasonable suspicion that the employee was involved. Here, there was $1,800 in cash shortages and another employee reported seeing the Respondent remove money from the cash register and place it in an envelope containing her personal cancelled checks. Accordingly, this would have been an appropriate case in which to give a polygraph test under the Act. Further, the Act specifically requires the employer to interview the employee following the polygraph test

(Section 2007(b)(4)(A)). Here, the outrageous conduct leading to punitive damages occurred, if at all, during the post-test interview. There is nothing in the Act which would prevent a jury from awarding both damages for outrageous conduct and punitive damages as was done here. The Employee Polygraph Protection Act of 1988 does not moot the issues presented in this case. It does not even address those issues.

The Respondent also asserts that the 1986 amendment to the Colorado punitive damages statute provides an even more detailed statute regarding punitive damages. This is true. However, it does not render the issues presented by the Petition for a Writ of Certiorari moot. Firstly, the 1986 amendment is not retroactive and controls only cases arising after its effective date. It

does not apply to this case or any other cases arising prior to the Act. Secondly, as pointed out on pages 27 to 29 of the Petition for a Writ of Certiorari, the amended punitive damage statute is still deficient because it fails to guide jurors as to the circumstances in which fraud, malice or willful and wanton conduct should be punished and fix a definite upper limit therefor, such as a maximum fine in a criminal case. Also, it fails to provide for a bifurcated trial.

If anything, the 1986 amendment illustrates the glaring deficiencies in the punitive damages statute as it existed at the time this action arose. It certainly does not render the issues moot in this case.

CONCLUSION

The Petitioners respectfully request that a Writ of Certiorari be granted in this case.

October 1, 1990

Respectfully submitted,

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